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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 384.

IDA McCLUNG, PLAINTIFF IN ERROR,

vs.

WILLIAM A. PENNY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

FILED JULY 24, 1902.

(16,812.)

(18,612.)

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a In the Supreme Court of the United States.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Citation.

The United States of America to William A. Penny, defendant in error, and Charles Ransom, his attorney of record:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be holden at Washington on the first Monday of December next in pursuance to a writ of error filed in the clerk's office of the supreme court of the Territory of Oklahoma, wherein Ida McClung is plaintiff in error, and you the said William A. Penny, are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error by the supreme court as in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John H. Burford, chief justice of the supreme court of the Territory of Oklahoma, this 19th day of June A. D. 1902.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of the Territory of Oklahoma.

I hereby acknowledge service of the foregoing citation this 19th day of June A. D. 1902.

C. W. RANSOM,
Attorney for Defendant in Error.

Filed Jul- 16 1902.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

b In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Return on Writ of Error.

In pursuance of the command of the writ of error within, I Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, herewith transmit a true copy of the opinion and judgment of the said court, together with a true copy of all the records and proceedings filed and recorded in my office as clerk of said court, in the above-entitled cause, and I also transmit herewith the original assignment of errors, the writ of error, the citation and proof of service thereof, in the said cause lately pending in the supreme court of said Territory, all under my hand and seal of said court.

Witness my official signature and seal of the said supreme court,

at the city of Guthrie, in said Territory, this 7th day of July, in the year of our Lord, one thousand nine hundred and two.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of Oklahoma Territory.

1 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Petition in Error.

Now comes the above-named plaintiff in error Ida McClung, and complains of the defendant in error, and alleges:

That heretofore, to wit, on the 26th day of October, A. D. 1900, the defendant in error recovered a judgment against the plaintiff in error in the district court of Kay county, Oklahoma Territory, for the possession of the southwest quarter (¼) of section thirty (30), in township twenty-six, (26), north of range one (1) east, I. M. in Kay county, Oklahoma Territory, and for costs of said action.

The plaintiff further alleges that there is manifest error in said judgment so rendered as aforesaid in said cause in this, to wit:

First. The court erred in assuming jurisdiction of the subject-matter of said action.

Second. The court erred in failing and refusing to dismiss said action on the motion of the plaintiff in error filed therein, and for the reason that neither the probate court nor the district court had jurisdiction to determine the rights of the parties.

Third. The court erred in allowing any testimony to be introduced in said cause over the objections of the plaintiff in error.

Fourth. The court erred in finding the issues in said cause in favor of the defendant in error.

Fifth. The court erred in rendering judgment in favor of the defendant in error for restitution of the premises and for costs of suit.

Sixth. The court erred in overruling the motion of the defendant in error for a new trial in said cause.

2 A case-made containing a full and complete record of the trial of said cause is hereto attached and made a part of this petition in error;

Plaintiff in error therefore prays that the judgment of the district court of Kay county be reversed and that said cause be remanded to said district court with an order that the said judgment be vacated and set aside and that said case be dismissed.

Plaintiff prays for such other and further relief as may be deemed just and equitable.

PANCOAST & BOWLES,
Attorney for Plaintiff in Error.

Filed, Apr. 15, 1901.

BENJ. F. HEGLER,
Clerk of Supreme Court,
By JESSIE PARDOE, *Deputy.*

In the District Court in and for the County of Kay, Territory of Oklahoma.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG, Defendant.

Case-made.

Be it remembered; that on the 14th day of May, A. D. 1900, the above-named plaintiff commenced his action against the above-named defendant in the probate court of Kay county, and on said day filed his complaint in said action, and caused a summons to be issued thereon; which said complaint is in the words and figures as follows, to wit:

Before Robert A. Neff, probate judge of Kay county, Territory of Oklahoma, and in the probate court of said county.

3 The said Neff being *ex officio* a justice of the peace.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG, Defendant.

Complaint in Forcible Entry and Detainer.

Come- now the plaintiff, William A. Penny, and for his bill of particulars and complaint herein, states, that he is the owner of and entitled to the immediate possession of the southwest quarter (¼) of section thirty (30) in township twenty-six (26) north of range one (1) east of the Indian meridian in Kay county, Oklahoma Territory; that the defendant, unlawfully, wrongfully, and forcibly detains and withholds possession of said quarter section of land, or a part thereof from this plaintiff, although plaintiff is, and at all times herein mentioned was, entitled to the immediate and peaceable possession thereof. And plaintiff further states that on the 9th day of May, A. D. 1900, he served upon the said defendant, personally a notice in writing to leave, vacate and quit said premises and every part thereof, within three days, or an action of forcible entry and detainer would be brought to compel the same; that the said defendant, has failed and refused to comply with said notice, but still, unlawfully and wrongfully, detains the possession of said premises from this plaintiff, who is entitled to the immediate possession thereof.

Wherefore, plaintiff prays judgment against the said defendant for the possession of each and every part of said quarter section, to wit, the southwest ¼ of section thirty (30) in township twenty-six (26) north of range one (1) E. I. M. in Kay county, Oklahoma for the costs of this action and all other proper relief.

J. F. KING,
Attorney for Plaintiff.

4 TERRITORY OF OKLAHOMA, } ss:
Kay County, }

William A. Penny, being first duly sworn, upon his oath states that he is the plaintiff in the above-entitled action, and has read the above and foregoing complaint and knows the contents thereof, and that the statements therein contained are true.

WILLIAM A. PENNY.

Subscribed in my presence and sworn to before me this 12th day of May, 1900.

ROBERT NEFF,
Probate Judge.

Endorsement: Filed May 14, 1900. Robert Neff, probate judge.

That thereafter, on the 26th day of May, A. D. 1900, the defendant filed her motion in said cause to consolidate with said cause the action of William A. Penny *vs.* Robert Winebrenner. Which said motion is in the words and figures as follows, to wit:

In the Probate Court of Kay County, Oklahoma.

WM. A. PENNY
vs.
ROBERT WINEBRENNER.

Now comes the above-named defendant and moves the court to consolidate this case with the case of Wm. A. Penny *vs.* Ida McClung, for the following reason:

That Ida McClung *vs* (is) the real party in interest and is claiming the right to the land invalued and the possession thereof, and that this defendant is only the tenant of said Ida McClung and has no other interest therein.

5 J. L. PANCOAST,
Att'y for Defendant.

Ida McClung hereby joins in this motion.

J. L. PANCOAST,
Att'y for Ida McClung.

Endorsement: Filed May 26, 1900. Robert Neff, probate judge.

That the order was made upon said motion, consolidating the two causes.

That thereafter, on the said 26th day of May, A. D. 1900, the said defendants, Ida McClung, and Robert Winebrenner, filed their affidavits and application for a change of venue of said cause; which said affidavit and application is in the words and figures as follows, to wit:

In the Probate Court of Kay County, Oklahoma.

WM. A. PENNY
vs.
IDA McCLUNG.

TERRITORY OF OKLAHOMA, *County of Kay,* } *ss:*

Ida McClung and Robert Winebrenner, being duly sworn state that they are the defendants in the above action. Defendants further state Judge Neff, the judge of this court, is a material witness on behalf of the defendant in this case. Defendant further states that she demands a jury for the trial of said cause and they verily believe they cannot have a fair and impartial trial of said cause in this, the township of Newkirk, on account of the bias and prejudice of the citizens thereof. Defendant therefore asks that the place of trial of this case be changed to some justice of another township.

6 Defendant hereby confesses judgment for all costs as provided in section eighty-three (83) of article seven (7) of justices procedure statute of 1893.

R. L. WINEBRENNER.
IDA McCLUNG.

Subscribed and sworn to before me this 26th day of May, 1900.
ROBERT NEFF,
Probate Judge.

Endorsement: Filed May 26th, 1900. Robert Neff, probate judge.

That upon the presentation of said application, the same was by the court overruled, to which ruling of the court the defendant then and there duly excepted.

Be it further remembered; that on the 26th day of May, A. D., 1900, the defendants filed their answer in said cause; which said answer, with the exhibits thereto attached, is in the words and figures as follows, to wit:

In the Probate Court of Kay County, Oklahoma Territory, Acting under the Jurisdiction of the Justice of Peace.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA McCLUNG and ROBERT WINEBRENNER, Defendants.
} Answer and Bill of Particulars of Ida McClung, Defendant.

Now comes Ida McClung and Robert Winebrenner — for their answer to the bill of particulars of the plaintiff filed herein, says;

First. That they deny each and every statement, allegation and averment therein, contained, except as hereinafter specifically admitted.

Second. The defendants admit that they are in possession of a portion of the land described in the plaintiff's bill of particu-
7 lars, to wit, the southwest quarter of section 30, in twp. 26, north of range 1 east.

Third. This defendants further say-, that the title of the land is in dispute between plaintiff and this defendant, Ida McClung and that this defendant desires to make defense of her title and interest in said land, and that her defense is *bona fide*, and not made for the purpose of vexation or delay, but for the promotion of justice as will more fully appear from the facts in relation to her claim, which are as follows:

That this defendant is the widow and heir-at-law of Charles R. McClung, who was on the 16th day of September, 1893, a native-born citizen of the United States, over the age of 21 years, and was in all respects qualified to make entry upon public lands under the laws of the United States in the Cherokee Outlet;

That prior to the said 16th day of September, 1893, the said Charles R. McClung, desiring to enter upon the race for land in the Cherokee Outlet, procured a booth certificate at or near the booths south of the city of Arkansas City, in the State of Kansas, and at the hour of 12 o'clock noon, was upon the south line of the State of Kansas, ready to enter upon the race for a home in said Cherokee Outlet; that the said Charles R. McClung had never enjoyed a homestead right, and had never exhausted any of his rights under the laws of the United States, to take and hold a homestead in said Cherokee Outlet; that at the hour of 12 o'clock noon, central standard time, of the said 16th day of September, 1893, the said Charles R. McClung, with many thousands of other persons bend upon the same purpose started upon the race for a home in said Outlet, and the said Charles R. McClung ran with all possible speed to the land in question, and occupied the same for the purpose aforesaid; that he went upon the land and upon the 19th day of September, 1893, erected a tent thereon; that he immediately thereafter began improving said land by digging a well, building houses, making fence, and plowing and cultivating the same; that soon thereafter he established his residence upon the land and continued to reside thereon, with his family, until the
8 19th day of November, 1898, at which time he died, leaving this defendant as his widow and heir-at-law; that the said Charles R. McClung until the time of his death, improved and cultivated said land as required by the laws of the United States; that he built a good and permanent residence building upon said land; fenced about 155 acres thereof, placed in cultivation about 155 acres thereof, and at all times occupied and used said improvements in connection with his residence thereon; that the improvements on said land at the death of the said Charles R. McClung, and at the present time are of the total value of about $—; that ever since the death of Charles R. McClung, this defendant as his widow and heir-at-law, has continued to reside upon said land and continue to cultivate and improve the same, as required by the laws of the United States.

That on September 19th, 1893, one Perry Birdsell, made home-

stead entry for said tract of land, and on October 3rd, 1893, defendant's husband, Charles R. McClung, initiated a contest against said entry on the ground of priority of settlement, and on October 25th, 1893, the plaintiff in this case, William A. Penny, filed an affidavit of contest against said entry, alleging priority of settlement, and on December, 15th, 1893, applied to intervene in the case of McClung vs. Birdsell. Which application was granted and the cases were consolidated, and set for hearing on April 3rd, 1894.

That on March 28th, 1894, the said entry of Birdsell was concelled by relinquishment, and on the same day the husband of this defendant, Charles R. McCung, made homestead entry of said land; that various other proceedings were had with reference to said entry and contest, which more fully appear from the decisions of the Land Department; that various trials and hearings were had in the local office before the Commissioner of the General Land Office and the Secretary of the Interior, of the controversy between the plaintiff and this defendant as heir-at-law of the said Charles McClung, although at all times the said cause proceeded and was liti-
9 gated in the name of the said Charles McClung, and in each and all of said trials, and hearings it was admitted by the plaintiff and so found by the various officers of the Land Department, in the decisions rendered, that the said plaintiff had entered upon the country known as the Cherokee Outlet, subsequent to August 26, and prior to September, 16. 1893; at 12 o'clock noon, and at the hour of the opening of said Outlet, the said plaintiff was in the outer boundaries thereof, and was on the east bank of the Arkansas river, on that part of the Cherokee Outlet known as the Osage Indian reservation, and continued there during the forenoon of the 16th day of September, 1893, and up to and including the hour of 12 o'clock of said day, and immediately after the hour of noon of said date, the plaintiff went across the river, and proceeded to and went upon the land in controversy and staked the same; that in all of said contests and trials, it was found and adjudged that the rights of said William A. Penny, plaintiff herein, were superior and paramount to the rights of the said Charles R. McClung, and this defendant, which said decisions and judgments were based upon an erroneous conclusion of law in this:

That the said officers of the Land Department held and concluded that the said William Penny was disqualified to enter upon and hold said land as a homestead by reason of his having entered upon the said Cherokee Outlet, and upon said portion thereof, known as the Osage Indian reservation, within said Outlet, prior to September, 16, 1893, and subsequent to August 26, 1893, and by reason of his having been in close proximity to said land at the hour of opening and taking advantage of his position to reach said land in advance of the said Charles R. McClung. A copy of the decision of the local land office at Perry, O. T. is hereto attached, marked Exhibit "A," and made a part of this answer.

That from said decision in favor of the said Charles R. McClung, the said plaintiff appealed to the Commissioner of the General Land Office, that on August 24, 1895, the action of the local officers was

affirmed, and from that decision the plaintiff appealed to the
10 Department of the Interior, and by departmental decision of August 28, 1896, the decision of the local office was then affirmed, and the contest of the plaintiff herein was dismissed. A copy of which decisions *are* hereto attached, marked Exhibits "B" and "C" respectively.

That hereafter the plaintiff herein filed a motion for review of said departmental decision, and that on September 24th, 1897, the said contest cause was remanded to the local office for further hearing, upon the question of priority of settlement.

That hereafter a hearing was had, and the local office at Perry, O. T. found that Penny was the prior settler on the land, and recommended that the entry of the said Charles R. McClung be cancelled.

That thereafter the said Charles R. McClung appealed from said decision to the General Land Office and on August 16th, 1898, a decision was rendered affirming the decision of the local officers, and holding McClung's said entry for cancellation.

That thereafter McClung appealed from said decision to the Department of the Interior, where on March 3, 1899 a decision was rendered reversing the said decision of the General Land Office, and holding that McClung was the prior settler on said land and dismissing the plaintiff's contest;

That thereafter the plaintiff herein filed his motion for review of said last-mentioned decision and by departmental decision of May 1, 1899, said motion was denied and the said decision of March 3, 1899 was adhered to.

That thereafter a petition was filed by the plaintiff herein alternately praying that a rehearing of said cause of review thereof upon the record as already made be ordered under the supervisory authority of the Secretary.

That on September 29, 1899, it was ordered by this department that said petition be entertained, and on November 16th, 1899, Ida McClung, widow of Charles McClung, filed an answer to said petition, and the case was again considered before the department upon said petition, and answer, together with the original record;

11 That thereafter and on April 17th, 1900, the former decisions of the Department of the Interior were again reversed and the said plaintiff herein was held to be the prior settler upon said land, and the entry of the said Charles R. McClung, was held for cancellation. A true and exact copy of said decisions *are* hereto attached, marked Exhibits "D" and "E" respectively.

Defendant further says; That by reason of said misapplication of the law herein set out, and for no other reason, the said plaintiff was permitted to make homestead entry upon said land, and the homestead entry of the said Charles R. McClung, which inured to the benefit of this defendant by reason of the fact that she is his widow and heir-at-law, was unlawfully cancelled of record.

That if said mistake had not been made this defendant would have been awarded said land, and the homestead entry of the said Charles R. McClung left intact.

That this defendant, as well as the said Charles R. McClung in

his lifetime, has at all times resided upon and cultivated said land in good faith and as required by the laws of the United States for the purpose of acquiring a full and complete title thereto, and defendant is still residing upon and cultivating said land for the same purpose, and for no other purpose. That by reason of the interest which she has in said land, by virtue of her compliance with the laws of the United States, the title of said land is in dispute between the plaintiff and this defendant, and the plaintiff has no right to oust the defendant from the possession thereof, except by showing to the court that the facts set forth herein are not true and that there *are* no legitimate controversy between plaintiff and defendant, with reference to the title and ownership of said land.

That this defendant intends, as soon as patent issued to said plaintiff, to begin an action in a proper court, to have the same declared a title in trust for the benefit of this defendant, and to
12 have said erroneous and unlawful conclusions and judgments of the Land Department set aside; that if said plaintiff is permitted to oust the said defendant from the possession of said land, defendant will be powerless to prevent a relinquishment thereof, by which the plaintiff might place it beyond the power of defendant to cancel any title which might be granted by the Government of the United States.

That this defendant is informed and believes and therefore states the facts to be that it is the intention and purpose of the said plaintiff, that in the event that defendant is removed from said land, to relinquish the same to the Government of the United States, for the benefit of some person, a stranger to the disqualifications of plaintiff and thereby defeat the rights of this defendant to acquire title to said land and receive the benefits of her compliance with the laws of the United States, and to perfect the interest which she has gained in said land by reason thereof.

That said land with the improvements of the defendant thereon is reasonably worth and the relinquishment thereof could be sold for the sum of $5,000; that this defendant demands the right to remain in possession of said land by virtue of her vested interest therein, and as against the claims of said plaintiff under his void and unlawful homestead entry, in order to protect the limited title which defendant has acquired in said land, and to acquire a perfect legal title therein, under and by virtue of the laws of the United States.

The defendant further says, that she, together with Charles R. McClung, has fully complied with all the laws of the United States with reference to homesteads, and has resided upon and cultivated the said tract of land, continuously for a period of over five years and has performed all acts with reference to residence and cultivation required by law, and is now entitled to a patent therefor, from the United States.

That Robert Winebrenner is in possession as the tenant of Ida McClung.

Wherefore, defendant prays that plaintiff be not allowed to
13 maintain his action herein, and if said action be not dismissed that the same be certified by this court to the district court in order that the claims and rights of this defendant may be fully adjudicated.

J. L. PANCOAST,
Attorney for Defendant.

THE TERRITORY OF OKLAHOMA, } ss:
Kay County, }

Ida R. McClung, being first duly sworn on her oath states; that she is the defendant mentioned in the foregoing answer, and in the above-entitled action; that she has read the foregoing answer and bill of particulars, and knows the contents thereof, and that the facts set forth in the grounds following the general denial, are true.

IDA McCLUNG.

Subscribed and sworn to before me this 26th day of May, 1900.

ROBERT NEFF,
Probate Judge.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *April* 17, 1900.

Served May 17, 1900. Vol. 26, 658, W. V. D.

WILLIAM A. PENNY } Alternative Petition for Hearing or for
vs. Exercise of Supervisory Power.
CHARLES R. McCLUNG. }

The Commissioner of General Land Office.

SIR: On September 19, 1893, Perry Birdsell made homestead entry for the S. W. ¼ of sec. 30, T. 26, N. R. *L.* E., Perry, Oklahoma, land district.

14 On October 3, 1893, Charles R. McClung initiated contest against said entry on the ground of priority of settlement.

On October 25, 1893, William A. Penny filed an affidavit of contest against said entry, alleging priority of settlement and on December 16, 1893, applied to intervene in the case of McClung *v.* Birdzell.

The application was granted and the cases were consolidated and set for hearing April 3, 1894.

On March 28, 1894, said entry of Birdzell was cancelled on relinquishment, and on the same day McClung was allowed to make for the land.

The said relinquishment of Birdzell left only McClung and Penny contesting for the land.

After several continuances the case was heard on April 26, 1894. Penny testified that he entered the Territory on the day of the opening (September 16, 1893) from the Ponca Indian reservation, and upon the conclusion of his testimony counsel for McClung moved to

dismiss his (Penny's) contest on the ground that he, having made the race from the Ponca Indian reservation, was disqualified from making entry for the land. Said motion was sustained by the register and receiver, who thereupon recommended that said contest be dismissed. Penny appealed to your office, where, on August 24, 1895, the action of the local officers was affirmed, and from that decision Penny appealed to this department, and by departmental decision of August 28, 1896, following the holding in the case of Cagle *v.* Mendenhall (20 L. D., 446) said decision of your office was affirmed and Penny's contest was dismissed.

Penny filed a motion for review of said departmental decision, and while said motion was pending, this department, December 23, 1896, in the case of Brady *v.* William (23 L. D. 533), overruled the case of Cagle *v.* Mendenhall, and held that the facts having made the race from an Indian reservation did not disqualify one from making an entry for said lands.

15 On September 24, 1897, the case of Penny *vs.* McClung was remanded to the local office for further hearing on the question of priority of settlement.

The further hearing was had, and thereupon the local officers found that Penny was the prior settler on the land in controversy, and recommended that McClung's entry be cancelled.

McClung appealed to your office, where, on August 16th, 1898, a decision was rendered affirming the action of the local officers and holding McClung's said entry for cancellation. McClung appealed from said decision to this department, where, on March 3, 1899, a decision was rendered reversing said decision of your office, holding that McClung was the prior settler on said tract and dismissing Penny's contest.

Penny filed his motion for review of said last-named decision, and by departmental decision of May 1, 1899, said motion was denied and said decision of March 3, 1899, was adhered to.

An informal and later a formal petition was filed by Penny alternatively praying that a rehearing of said cause or a review thereof upon the record as already made be ordered under the supervisory authority of the Secretary of the Interior.

On September 29, 1899, it was ordered by this department that said petition be entertained, provided, copies of the same and accompanying papers and of said departmental order should be served upon the opposite party and said petition returned to your office with evidence of such service within thirty days from receipt of said order. Said petition, etc., was duly returned with evidence of service of copies of same on F. L. Harvey, attorney for McClung on October 16, 1899.

On November 16, 1899, counsel for McClung filed an answer to said petition, and the case is now before the department for consideration upon said petition and answer, together with the original record.

It is alleged in said petition that:

1. An examination of these two decisions (decisions of March 3, 1899, and May 1, 1899) in connection with the record in the case

shows such manifest errors in said decision as call for prompt revision.

16 2. It is insisted that said departmental decision of March 3, 1899, admitted that Penny was the prior settler, and yet in the face of said decision and admission, that the departmental decision of May 1, 1899, states that, 'The department has found that Penny was not the prior settler; that McClung was the prior settler,' and this alleged to be contrary to the facts appearing in the record.

3. It is alleged that in said decision of March 3, 1899, it was erroneously stated that 'Penny's entire expenditure upon the land up to the date of hearing would appear to have been $25 to $40' and that this error was practically admitted in said decision of May 1, 1899 and the effect sought to be avoided by the statement 'that the added improvements of Penny, running into hundreds of dollars, were hastily put upon the land after the department had ordered rehearing' and it is suggested that these discrepancies in the statement of facts indicates that said decisions have not correctly comprehended the facts.

4. It is pointed out in said petition that said decisions expressly hold that Penny did not on September 16, mark out a place where he afterwards started his dugout, and it is insisted that the proof shows that Penny, on September 16, did some excavating at a place he *then* intended to build his dugout.

5. It is also insisted in said petition that the statement contained in said departmental decisions to the effect that McClung erected a tent on the land in controversy on September 19, 1899, is not sustained by the proof.

6. It is further insisted that the department erred in holding that the restraining order procured by McClung was not a sufficient excuse for Penny's failure to comply with the requirements of the law in the matter of improvement and cultivation of the land and residence on it.

For the defendant it is insisted that said petition is only a reiteration of the allegations of error made in the former motion for review, and that the matters therein presented have been fully considered and passed upon by the department and should not now be reopened.

The question of priority of settlement was considered in said decision of March 3, 1899, and that the erection of a tent on the land by McClung on September 19, 1893, was referred to as his first act of settlement, and the proof seems to sustain said decision as to the erection of said tent; but it was not in terms admitted in said decision that Penny was the prior settler on the land, but it was held substantially that while he was the first to reach and stake the land his acts of settlement thereon, prior to McClung's settlement, were not such as to give lawful notice of his claim, and that therefore he was not in legal effect the prior settler. The acts of both parties were considered with reference to the establishment and maintenance of residence, improvement and cultivation of the land, etc.,

17 and in that connection consideration was given to the restraining order relied upon by Penny to excuse him from

doing more than he had done in the matter of residence on, and improvement and cultivation of, the land.

Notwithstanding the matters referred to in said petition seem to have been considered in said former decisions, still if it appears that the findings of the department in said decisions are erroneous as to material matters of inquiry, and that injustice will result from said decisions, this department will in the exercise of the supervisory authority conferred upon it by law, recall said decisions, correct said findings and render such decision as may appear to be just and proper upon a reconsideration of all the evidence.

The relinquishment of Birdzell left the contest between Penny and McClung who stood upon equal footing as contestants, and the fact that McClung was erroneously allowed by the local officers to make entry for the land while Penny was contesting on the ground of prior settlement, gave McClung no advantage in the contest, and hence, in weighing the evidence McClung's entry cannot be held to require a preponderance of proof on Penny's side, any more than if the entry had not been made.

The proof shows that Penny arrived on the land a few minutes before one o'clock, p. m. September 16, 1893, and at once put up a stake upon which he tied a red handkerchief; the stake was about 75 or 100 yards from the south line of the tract. He then proceeded to dig a hole 18 inches in diameter and eighteen inches high. This hole was commenced for a well. On the same afternoon he dug and threw out a portion of the river bank at a point where he then intended to build a dugout. It seems the bank of the river at that place is very precipitous and at night when Penny and others in the neighborhood went to water their horses in the river, they found that the digging that Penny had done made that particular place the most convenient one to go down the bank to water, and he then determined to use it for that purpose. He slept on the claim the night of September 16, and the next day went to the land office at Perry to get a number preparatory to filing on the land. He returned to the land on the afternoon of the 19th about three or
18 four o'clock, and, on the morning of the 20th he started back to Perry to see about his filing. He left the claim between seven and eight o'clock, but before leaving he marked off a new place where he wanted his dugout made, and engaged two men to dig in it while he was gone. In marking the place he used a spade. He did not dig much but marked the ground to show the men where they should dig the dugout, and they commenced excavating about ten o'clock on the morning of September 20th. On that day they dug the west end of the dugout down about a foot or a foot and a half deep, clear across dug the doorway open and dug around where Penny had marked off for the building. They threw the dirt up on one side and it made a mound that a witness says, was "plain to be seen anywhere."

It appears that Penny had two wagons on the land, in one of which he rode when he made the race on the day of opening, and in which he and Brady rode to Perry on September 20, and the other one was brought in for him to convey provisions, cooking

utensils, tools, etc. The proof does not show whether or not his last-named wagon was left on the land when Penny went to Perry on the 20th, but it is not shown to have been moved off the land.

Penny returned from Perry on Friday, September 22, a little before dark, and Brady, who was with him, testifies that at that time he saw the dirt that had been thrown out where the men had been digging on Penny's dugout, and that it was within 100 yards of the road and was in plain view.

Brady testified that on the same night (September 22,) as he and Penny were returning from the land office he heard a conversation between Penny and McClung in which McClung told Penny that if he (Penny) could hold, coming from the reservation, he wouldn't give him any trouble.

On September 28, Penny had some logs cut, hauled and put on his dugout and he continued to work on it at intervals till it was finished, which was some time in October, and on November 17th, Penny moved his family into it and he claims to have re-
19 sided there ever since. He testifies that when he moved his family to the dugout he found that McClung had fenced nearly all the land, leaving a roadway outside the fence along the river bank, in which roadway Penny's house stands. This roadway is shown to be about 30 feet wide. Penny says that while he was unloading his things at this dugout McClung passed by and told him that if he (Penny) went inside his fence he would spend a thousand dollars on him, and that he (Penny) understood that to be a threat that McClung would sue him, and he swears that he was a poor man and not able to bear the expense of a lawsuit, while he understood that McClung was a man of considerable means, and would put him to all the trouble and expense he could.

Finding himself thus fenced out and forbidden to enter the land, Penny went to Newkirk for the purpose of applying to the district court for an order giving him possession of a portion of the land. The district court not being in session, he made his application to the probate judge, by whom an order was granted giving Penny possession of one-half of the land, pending the contest, and under that order he, at once, entered the enclosure and resumed work on the well he had commenced on the day of the opening. At that time there was no plowing done on the land. McClung served a notice on Penny to appear before the judge of the district court at chambers, at Round Pound, to show cause why said restraining order made by the probate judge should not be dissolved, and a day or two later he (McClung) gave notice that he would apply to said district court for an order restraining him (Penny) from interfering with the land. Penny seems to have prepared for the trial elsewhere. He says, "I went to Newkirk, took the affidavit of Mr. Brady and myself and presented them there to Round Pound." What other evidence, if any, he offered, or what was offered by McClung does not appear, but the result was that the injunction granted by the probate judge was dissolved and a temporary injunction was granted to McClung by the district judge restraining

Penny from interfering with any of the land embraced within
20 McClung's enclosures. This last-named injunction seems to have been granted upon a cross-petition of McClung in the case of Penny *vs.* McClung. The case came on for final hearing before the district court of Kay county, Oklahoma, on September 14, 1894. McClung appeared in person and by attorney, but Penny did not appear either in person or by attorney, and the temporary injunction granted in favor of McClung by the district judge at chambers, was ordered to remain in force till the rights of the parties to the land should be determined by this department.

Penny now claims that it was in consequence of this injunction that he did no more than he did in the way of cultivation, improvement and residence on the land. But it is insisted for McClung that Penny ought not to be allowed to plead that excuse now, because he made default at the final hearing, and allowed the temporary injunction to be made final without objection on his part, and it is claimed that if Penny had appeared at said final hearing and asked for an order allowing him possession of half of the land, such an order would have been granted by the court.

It is difficult to determine what might have been the action of the court if Penny had appeared and resisted McClung's application and asked for a division of the land. Some testimony is offered to show what was the customary action of the court with reference to dividing lands between litigants pending contests but no fixed rule has been shown, and it is impossible to determine what effect, if any, Penny's presence at the court, at the time the order was entered, might have had to prevent the order. What weight may have been given by the court to the claim that McClung had an entry of record for the land, and was therefore *prima facie* entitled to the possession cannot be shown, but that fact should not, in justice to Penny, have weighed in McClung's favor, because, as has been already stated, said entry should not have been allowed pending the contest. It is insisted for Penny that the prevailing opinion in that section at
that time was that those who, like himself, had made the race
21 from the Ponca reservation were not entitled to hold lands in the Territory, and that the court would have been disinclined to make an order allowing him possession of any of the land, even if he had appeared and asked for such an order. Proof has been offered to show that it was the custom of the court in such cases to allow a litigant to retain possession of all the land he had enclosed by fencing, while on the other hand it was customary to divide between the parties the "raw" or unplowed land, but not to take land that had been plowed from the possession of one party and give it to another.

The proof in this case shows at the time said final restraining order was entered, McClung had almost the entire tract fenced and about 100 acres of it plowed and Penny says, in explanation of his failure to appear at the final hearing, that he had offered all his proof at the preliminary hearing at chambers and had nothing further to offer; that at the time of preliminary hearing none of the land was plowed, while at the final hearing 100 acres were plowed, and there-

fore he had no reason to suppose that by merely appearing in court with no further evidence, the court would take from McClung, an entryman, the plowed land which had been awarded to him before it was plowed and give it to him, (Penny) who was a Ponca runner and had no entry of record, and being scarce of means to defray the expenses of further litigation he did not think it advisable or necessary that he should attend at said hearing. This explanation seems to be sufficient, if indeed, any were necessary. The injunction in any event was to be operative only until the rights of the parties should be determined by this department. Being enjoined from interfering with the land enclosed by McClung, Penny could not, without incurring the penalty for a contempt of the process of the court, enter upon, improve or cultivate that land, and he cannot be deprived of the benefit of this excuse unless it be affirmatively shown by McClung that the issuance of the injunction was the result of Penny's negligence or acquiescence. That he did not acquiesce in the granting of the temporary or preliminary injunction is admitted, and it appears that he contested the granting of it the best he could. The situation had not changed in his favor between that time and the final hearing, but rather against him; so as he looked at it he could hope for no action in his favor by the court until his right was recognized by the Land Department.

Penny's family remained on the land in controversy from November 17, 1893, till August 17, 1894. During that time Penny was working for S. W. Coffelt, who resides in the same township. Coffelt could employ him no longer and being unable to rent land in that vicinity, he rented a farm in Kansas. Previous to the opening of the land in controversy to settlement, Penny was engaged in farming on rented land in Kansas, and after the issuance of the injunction, he says, he made various efforts to rent lands in the vicinity of his residence, but was unable to do so. It is shown by McClung that some Indian allotments in that vicinity were rented after that time, but Penny says that he was unable to comply with the terms upon which they were rented in that a bond was required of the renter, which, being a stranger in the community, he could not give, and so he went into the neighborhood in which he had formerly lived in Kansas and rented a farm several miles from the one he had formerly lived —. From August 17, 1894, till about fifteen months before the time of the hearing, the family frequently left the claim in controversy and went to the newly rented farm in Kansas to assist him in his farming operations. On these occasions they would take with them a portion of their household goods, such as bedding, etc., but always left a portion on the claim, and they always left with the intention of returning to the claim when their work on the farm was finished and they never remained away from the claim as much as six months at any time.

Coffelt, who testifies that he gave particular attention to the dates on which they left the claim and on which they returned, says they first left August 17, 1894, and returned February 13, 1895; left again March 17, 1895 and returned in the following June, left again shortly afterwards and remained away sixteen days, and then re-

turned and stayed on the claim till May, 1896, the children going to the public school that year. From May 1896, they were absent till June 21, 1896, and his testimony is not very clear as to their whereabouts from that time till October 17, 1896, when they again returned and stayed till July 1, 1897, when
23 they left and remained away about sixty days, returning September 1, 1897, since which time they have continued to reside on the land. Before moving to the claim in controversy in 1893, Penny gave up the land he had rented in Kansas, sold his growing crop of wheat and made other preparations for permanently changing his home. When he moved to the claim he took with him his live stock, consisting of several head of horses and cattle and on reaching the claim and finding it fenced up by McClung, and having no place to keep his stock, he got some of the neighbors to keep the stock for him till he rented the farm in Kansas, and then, having pasture on that place, he moved a portion of the stock to the rented farm. He succeeded in renting land in the vicinity of his claim in the year 1897, and then moved his stock from Kansas again and McClung admits that since September 2, 1897, Penny has continued to reside on the land.

Considering the fact that by means of said injunction Penny was deprived of the possession of any of the land on which he could make a support, these temporary absences appear to have been necessary, and therefore cannot be held to have been an abandonment of his claim or to have broken the continuity of his residence thereon, which must be held to have been established in reasonable time. This leaves only one question to be determined, viz: whether or not Penny's acts of s-ttlement prior to McClung's settlement, were such as to manifest his intention to claim the land and sufficient to give reasonable notice thereof.

McClung relies upon the erection of a stake and tent on the land on the afternoon of September 19th, as his initiatory act of settlement. This tent was erected late in the afternoon of the 19th. Park Bridges, a witness for McClung, says that he assisted in putting up the tent, and that it was erected "in the evening towards dark" "about sundown." The wind blew the tent down soon after it was erected. McClung says it was blown down about sundown. Said departmental decision of March 3, 1899, states that "about four o'clock the same day (September 19) he put up a tent in which he put some bed clothing, cooking utensils and other articles;
24 that evening the tent blew down and McClung went to his cousin's and stayed all night; but on Wednesday morning, September, 20th, about eight o'clock he again put up the tent." Whether the tent was erected about sundown or toward dark, as testified by Bridges, or before that time the evidence does not show that McClung put anything in it that day; he (McClung) after stating that he erected the tent on the afternoon of the 19th, makes this statement about the matter:

We erected the tent and the ground was very hard, didn't get the tent up good and solid, I thought it would stand; we went on back to Kyle's tent where our cooking utensils and things were at that

time * * * I was going to return there and sleep in the tent that night, bring down my part of the things we brought in, bed, clothing, and cooking utensils and such things, and about sundown this tent blowed down * * * and told the boys didn't think it would make any difference, stay there with Kyle that night and go down the next morning and put the tent up.

It is stated in said departmental decision of March 3, 1899, that the tent was re-erected about 8 o'clock the next morning. McClung so testified and the preponderance of the evidence seems to sustain that statement, but it — controverted by Penny, and McClung's witness, Bridge, who was the only one who assisted in re-electing it, testified in reference to the time as follows:

Q. How long did that tent stand there where he put it up on September 19, 1893? A. It blew down that night we put it up, and laid there until evening of the 20th.

Q. Was the tent standing there on this tract throughout Wednesday (Sept.?) April 20th, 1893? A. It laid there until evening and then we put it up again.

Said departmental decision erroneously states that this witness "states that he assisted McClung in putting up his tent Tuesday afternoon and again Wednesday morning." Said decision after citing the testimony as to the re-erection of the tent on Wednesday morning, the 20th of September, states that "there is abundance of testimony that he had a tent on the land at eight o'clock, on September 20th, and there is no witness who places the first stroke of work done toward building Penny's dugout earlier than ten o'clock on that day." This statement is challenged by Penny, who refers to the evidence of digging done by him on the bank of the river on the day of the opening *at the place where he then intended to build his dugout.* This work was doubtless intended by Penny, at that time, as the beginning of his dugout, but finding that to be a convenient place to go down the bank of the river to water the stock, he changed his mind with reference to the location of his dugout, and on the 20th began it in another place where it was subsequently finished, and to show that said statement is not correct as to the time when the first work was done on Penny's present dugout, he cites the testimony of the witness William McBride, who testifies that Penny left the claim to go to Perry on the morning of the 20th between seven and eight o'clock, and that before leaving he took Webb and showed him where to dig the dugout and marked it out with a spade, "cut kind of a ring around the size he wanted * * * didn't do very much; just marked it good so it could be seen." The witness, A. Webb, testifies that he was present on Wednesday morning and saw Penny mark off with a spade, where he wanted his dugout made. The proof shows that Penny's dugout was made in the place marked out by him that morning. Just what time he marked off the place does not appear, but it was some time before he left for Perry, which is shown to have been before eight o'clock. He had engaged McBride and Coffelt to work on the dugout in his absence, and they begin digging about ten o'clock. So it appears that before McClung erected said tent and stake on Septem-

ber 19, Penny had put up a stake and flag; done some excavating on the river bank for a dugout; slept on the land; had his teams and two wagons there; had gone to the land office to make preparations to file on the land; had returned and was at that moment actually present on the land claiming it and before McClung re-erected the tent after it blew down (even his witness, Bridges, is mistaken when he says it was not re-erected till late in the evening of the 20th) Penny had commenced his dugout in the place where he subsequently finished it and where he still resides.

McClung states that at the time when he erected the tent and stake he had no knowledge that Penny had done any work on the land or was claiming it, but if the stake and the tent which McClung put up and which immediately blew down, were sufficient to give notice of his claim, certainly Penny's acts above
26 referred to, were sufficient notice of his claim and having been done within four days after the opening must be held to have been performed within reasonable time, and besides Penny swears and proves by three other witnesses that after McClung commenced to build his house he told him that if he (Penny) was not disqualified to make entry for the land by reason of having run from the Indian reservation, he would give him no trouble. McClung admits seeing Penny at the time and place mentioned by Penny and these witnesses and also admits having a conversation with him in which he says Penny told him he came from the east line but he denies having made the statement attributed to him by Penny and three other witnesses.

In regard to the alleged conversation Penny testifies as follows: I came from Perry, there was a house going up on this claim, two men working on it. I says, 'Who is building this house?' No; I says, 'Is there a party by the name of Birdzell here?' And that gentleman, there, Mr. McClung, come out and says, 'There is not,' and I said, 'Who is building this house?' He says, 'I am.' I says, 'Do you know that this is my claim?' He says, 'I knowed somebody was claiming it.' Wanted to know then if I had run from the east side; I said I did; he says, 'If you had a right to run from there, I will make you no trouble.'

This testimony was given in relation to a conversation alleged to have taken place on September 22, 1893, and Penny testified further as follows:

Q. State, Mr. Penny, what conversation took place between you and Mr. McClung on the 28th or 29th of September, if any. A. On the 28th or 29th of September Mr. Coffelt and Mr. Frantz, Charley Brady had been working on my house; as we went up where he was, and went out to look at a drill, it was a new kind of a drill, one I had never seen, and was looking at it, and the conversation came up about some man writing a letter in the paper that the east liners had a right to run; I showed it to him; he said that was only one man's opinion; that was the opinion of only one man, and he didn't care for that, and if I had a right to run from there, I was there before he was and that he would give me no trouble.

In the conversation first referred to, the witness states that Mc-

Clung admitted that he knew there was some one claiming the land and admitted that if Penny was qualified to enter it, his (Penny's) claim was superior to his and in the conversation the 28th or 29th of September he expressly admitted that Penny was there before he was.

These admissions by McClung shows that he knew, either
27 by seeing Penny's improvements and evidences of settlement on the land, or by some other means, that Penny had claimed the land before he did, and if he, with the knowledge of that fact, entered upon the land, set up a stake and a tent and undertook to hold the land against the known prior settler, he cannot be heard to say that Penny's acts of settlement were not sufficient to give notice of his claim. The placing of improvements on a claim only amounts to constructive notice, while McClung is shown by his own admissions to have had *actual* notice.

The result is that said departmental decisions of March 3, and May 1, 1899, are hereby recalled and this decision is substituted in lieu of said decision of March 3, 1899. Your said decision of August 16, 1898, affirming the decision of the local officers, is affirmed, and said entry of McClung will be canceled provided Penny shall complete his entry within a time to be fixed by your office.

The papers in the case are herewith returned to your office.

Very respectfully, E. A. HITCHCOCK, *Secretary.*

E. N. W.

Ex. "B."

"H."
J. L. M.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *April* 30, 1900.

Doc. 6, case 8427.

WILLIAM A. PENNY
v.
C. R. McCLUNG.

Register and receiver, Perry, Oklahoma.

SIRS: In reference to the above-entitled case, involving the S. W. ¼ section 30, township 26, range 1, covered by H. E. No. 5963, made by McClung February 24, 1894, you will find herewith a copy of departmental decision of April 17, 1900, recalling departmental decisions of March 3, and May 1, 1899, which reversed the decision of this office dated August 16, 1898, in favor of Penny.

The department now directs that in event Penny completes
28 entry of the land at a time to be fixed by this office, McClung's entry be canceled.

You will notify the parties in interest of said decision and Penny that he will be allowed thirty days to enter the land, and in event of his so doing, you will cancel the entry of McClung and report the same to this office in a separate letter.

Penny's booth certificate is herewith returned, to be placed with his entry should he make one.

The case is hereby closed.

Very respectfully,

W. A. RICHARDS,
Assistant Commissioner.

UNITED STATES LAND OFFICE,
PERRY, OKLA. TER., *October 3rd*, 1900.

I, Alfred H. Boles, register of the United States land office at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision in the case of Penny *vs.* McClung now on file in my office.

ALFRED H. BOLES, *Register.*

Being the Secretary's decision dated April 17th, 1900, and Commissioner's letter dated April 30, 1900.

Endorsements on answer: Filed May 26th, 1900—Robert Neff, probate judge.

Be it further remembered: that thereafter, on the 26th day of May, A. D. 1900, the plaintiff filed his reply to the defendants' answer in said cause; which is in the words and figures as follows, to wit:

In the Probate Court of Kay County, Oklahoma Territory.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG and ROBERT WINEBRENNER, Defendants.

29 *Reply.*

Comes now the above-named plaintiff, William A. Penny, and for his reply to the third paragraph of defendants' answer denies each and every allegation therein contained except as hereinafter expressly admitted. Plaintiff admits that the defendants are in possession of (155) one hundred and fifty-five acres of the tract of land set out in plaintiff's bill of particulars, and were so in possession at the time of the commencement of this action.

Plaintiff admits that he is the homestead entryman of said land.

Plaintiff admits that there is no contest pending between the said defendants or either before the Land Department of the United States and this plaintiff involving said land or any part thereof.

Plaintiff admits that defendant, Winebrenner, is the tenant of his codefendant, McClung of the said tract of land and has no other interest in said land or any part thereof.

Wherefore plaintiff prays judgment against said defendant for possession of said premises and costs.

J. H. KING AND
C. W. RANEY,
Att'ys for Plaintiff.

Endorsement: Filed May 26, 1900. Robert Neff, probate judge.

Thereafter, on the 26th day of May, A. D. 1900, a trial was had in said cause before the court and jury, and a verdict rendered in favor of the plaintiff, and judgment was thereupon rendered in favor of the plaintiff on the verdict for the possession of the property and for costs of suit.

That thereafter, on the 4th day of June, A. D. 1900, the defendant, Ida McClung, filed her appeal bond in due form, which was on said day approved by the court, and duly perfected her appeal in said cause to the district court of Kay county,—

30 A transcript of said proceedings and judgment before the said probate court is in the words and figures as follows, to wit:

Probate Judge's Transcript.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

Before Robert A. Neff, probate judge of Kay county, O. T.

WILLIAM A. PENNY, Plaintiff, }
vs.
IDA MCCLUNG, Defendant. }

Names of attorneys, J. F. King, J. L. Pancoast.

The plaintiff files complaint 5–14–1900. Summons issued served 5–14–1900. Returned 5–17–1900. Motion and affidavit for continuance (by def't) 5–18–1900. Motion to consolidate, answer filed, motion to strike out, reply and venire issued and served, returned 5–26–1900. Officer's return of services, "Personal service" day set for trial 5–18, 26–1900.

Plaintiff deposits $10,00 in lieu of cost bond. May 14th, 1900.

May 18th, 1900.—Defendant files motion and affidavit for continuance of eight days Case continued to May 26th, 1900, at 9 a. m.

May 26th, 1900.—Case called at 9 a. m. all parties present in person and by attorneys. The defendant in this case together with Robert Winebrenner file motion that this action and the action of Wm. A. Penny *vs.* Robert Winebrenner, be joined as one. There being no opposition to the motion. The said motion is sustained, and the two cases are hereby joined. Defendant files motion for change of venue, which motion the court overrules for the reason that

31 the said motion is not in conformity with the statutory requirements. To which ruling defendants excepts.

Plaintiff objects to defendants being granted leave to file answer at this time, and excepts to the order of the court permitting said answer to be filed. Application in the prayer of the answer court overruled, to which ruling defendants excepts. Defendants demand trial by jury and deposits $3.00 therefor. List prepared, jury struck, and venire issued. At the noon hour the court orders a recess until one o'clock p. m. At one o'clock p. m. court resumes. All parties present. The jury is examined, accepted and sworn to try the case.

The plaintiff introduces as witnesses, Wm. A. Penny, and rests. Defendants introduce as witnesses Ida McClung, R. L. Winebrenner, J. L. Pancoast, and rests. After argument by counsel for both the plaintiff and defendants the jury retire in charge of a duly sworn bailiff, and after due deliberation, returns into court the following verdict:

"In the Probate Court of Kay County, Territory of Oklahoma, Sitting at Newkirk, County of Kay, said Territory.

WILLIAM A. PENNY
vs.
IDA MCCLUNG and R. L. WINEBRENNER.

We, the jury, empannelled and sworn to try the issues in the above-entitled cause, do, upon our oaths, find the defendants guilty.

P. M. SMITH, *Foreman.*"

Wherefore, it is the order, judgment and decree that the defendants are guilty as charged, and that plaintiff is entitled to possession of the premises described in his complaint, and that he also have judgment for the costs of this action taxed at $18.65 and
32 $5.75 sheriff's cost against R. L. Winebrenner, a total taxed at $23.15.

ROBERT A. NEFF, *Judge.*

Appeal bond filed and approved, June 4th, 1900.

Probate judge's fees.		Defendant's witnesses.	Names of jurors and fees.
Transcript	$1.25	Ida McClung	T. Gabriel.....P'd 50c.
Transmitting papers	.25	R. L. Winebrenner	Byron Williams.....P'd 50c.
Certificate	.25	J. L. Pancaost	Thomas Smith.....P'd 50c.
Probate judge's fee	7.50		J. G. Long.....P'd 50c.
			F. M. Morrison.....P'd 50c.
Total	$9.25		P. W. Smith.....P'd 50c.

Sheriff's fees.		Plaintiff's witnesses.
Bringing into court	$8.15.	Wm. A. Penny.
No. of commitments	5.75.	
Total	$13.90.	

Receipt for fees.
$3.00 for jury fees.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

I, Robert A. Neff, the undersigned probate judge of Kay county, Territory of Oklahoma hereby certify that the above is a full and true copy from my Probate Judge's Docket, No. 1, page 189, of the proceedings had by and before me at my office in said county in the above action.

Witness my hand at Newkirk in said county this 18th day of August, A. D. 1900.

ROBERT A. NEFF,
Probate Judge.

Endorsement: Transcript. Robert A. Neff, probate judge. William A. Penny, plaintiff *vs.* Ida McClung, defendant.

33 Be it further remembered: That thereafter, at the September 1900 term, said cause coming on regularly to be heard before the district court, the said defendant, Ida McClung, filed her motion to dismiss said cause; which said motion is in the words and figures as follows, to wit:

In the District Court of Kay County, Territory of Oklahoma.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG, Defendant. } Motion to Dismiss.

Now comes the defendant and moves the court to dismiss the action of plaintiff herein for the reason that it appears from the pleadings and records of this cause that the title to the premises described in plaintiff's bill of particulars is in dispute and that a determination of the question of title is necessary in order to ascertain who is to prevail in this action, and that neither the lower court nor this court have jurisdiction to determine the rights of the parties in an action of unlawful detainer.

J. L. PANCOAST AND
S. H. HARRIS,
Attorneys for Defendant.

Endorsement: Filed Sept. 26, 1900. Jay E. Pickard, clerk. By E. A. Burke, deputy.

That said motion coming on to be heard before the court, and being duly considered and the court being advised in the premises, said motion was overruled. To which ruling the defendant, Ida McClung, then and there duly excepted.

34 Thereupon said cause was called regularly for trial, and a jury being waived the cause was tried to the court. A transcript of the evidence and proceedings of the trial of said cause is as follows, to wit:

Transcript of Testimony.

In the District Court of Kay County, Oklahoma Territory.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG, Defendant. } Case No. 1622.

Appearances: Ransom & Bailey, and J. F. King, for plaintiff. J. L. Pancoast and S. H. Harris, for defendant.

Be it remembered, that on this 26th day of October, A. D. 1900, a judicial day of the regular September term 1900, of the district court of Kay county, Oklahoma Territory, this cause comes on to be heard before his honor, Bayard T. Hainer, a jury having been previously

waived in open court by both parties, the following officers of the court also being present, Jay E. Pickard, clerk; M. A. Madaris, court crier; and Eugene F. Blaise, court reporter; and proceedings were had and done as follows, to wit:

WILLIAM A. PENNY, called on behalf of the plaintiff, being first duly sworn testified as follows:

Direct examination:

Q. State your name?
A. Wm. A. Penny.

Mr. PANCOAST: The defendant interposes a motion to dismiss this case because of lack of jurisdiction of the court, the defendant in the court below having filed an application for a change of venue.

35 The COURT; Present your motion.

Mr. PANCOAST: We offer in evidence this affidavit and also transcript of the probate court in support of the motion.

Which affidavit and transcript appear on pages — and — of this record.

Which motion is by the court overruled. To which ruling of the court the defendant then and there excepts.

Mr. PANCOAST: I want to object to the introduction of any testimony in this case for the reason that there is no jurisdiction in this court to try the action of forcible entry and detainer upon the pleadings—the pleadings of the plaintiff showing on its face that the question of the title of land is involved.

Which objection is by the court overruled. To which ruling of the court the defendant then and there excepts.

Q. State your name to the stenographer?
A. William A. Penny.
Q. What is your age?
A. Forty-nine.
Q. Where do you live and what is your business?
A. Kay county, Oklahoma; I am a farmer.
Q. Where were you born?
A. Illinois.
Q. I will ask you if you are the plaintiff in this case?
A. I am.
Q. You are the plaintiff in this case?
A. Yes sir.
Q. I will ask you whether or not you are the homestead entryman to the S. W. quarter of section 31, township 26, north range one east of the Indian meridian, Kay county, Oklahoma Territory?

Defendant objects as not the best evidence, which objection is by the court sustained. To which ruling of the court the plaintiff then and there excepts.

36 Q. Do you reside upon the S. W. quarter of section 30, township 26, range one east of the Indian meridian, Kay county, Oklahoma Territory?

A. Yes sir.
Q. Have you your homestead entry for that quarter section?

Defendant objects as incompetent and not the best evidence, which objection is by the court overruled. To which ruling of the court the defendant then and there excepts.

A. Yes sir, I have it.
Q. You may produce it. (Witness produces the instrument.)

Plaintiff here offers in evidence the homestead receipt, marked Exhibit "A," which appears on page 46 of this record.
Defendant objects as incompetent, irrelevant and immaterial.

Q. Do you know whose signature that is?
A. Mr. Scott's, the receiver of the land office; he signed it in my presence.
Q. Did you see him sign it?
A. Yes sir.
Q. Is that his signature there?
A. Yes sir.

Mr. KING: Plaintiff now offers in evidence Exhibit A.
Defendant objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the defendant then and there excepts.
Said Exhibit A is in the words and figures as follows, to wit:
Q. I will ask you whether or not you were the plaintiff in the contest case of William Penny against C. R. McClung, before the Land Department, for this quarter section of land mentioned?
A. Yes sir.

Plaintiff now offers in evidence the departmental decisions marked Exhibit "B" and attached to the answer in the case.
Which Exhibit B, which appears on pages — to — inclusive.

Q. Mr. Penny, how long have you been upon this land?
A. Since the opening; that is, that has been my home ever since the opening.
Q. When was that?

37 Defendant objects as immaterial, which objection is by the court sustained. To which ruling of the court the plaintiff then and there excepts.

Q. I will ask you whether or not you served a notice upon the defendant in this case Mrs. McClung?
A. Yes sir.
Q. Have you that notice with you?
A. Yes, sir, a copy of it.
Q. I will ask you to take that paper marked Exhibit "C" and state whether or not you served a copy of that on Mrs. McClung?
A. I did, on the ninth day of May.
Q. How did you do that?
A. By personally delivering it to her.

Q. Do you know it was a true copy?
A. Yes sir.

Plaintiff here offers in evidence Exhibit "C."

Defendant objects to the introduction of Exhibit C as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the defendant then and there excepts.

Which Exhibit C is in words and figures as follows:—and appears on pages 47 of this record.

By the COURT:

Q. Is that your land?
A. Yes sir.

By the COURT:

Q. That is the amount in controversy in this suit?
A. Yes sir.
Q. I will ask you whether or not on the 9th day of May 1900, the defendant in this case, Ida McClung, was occupying any portion of this land?
A. Yes sir.
Q. I will ask you to state to the court what portion of the land she was occupying, and in possession of?
A. About 155 acres.
Q. How much of it did you have on that date?
A. Five acres.
Q. Have you a plat there showing that land and what part she occupied?
A. No sir.
38 Q. I will ask you whether or not she occupied it with your consent and approval?
A. No sir, she did not.
Q. Has she continued to occupy that up to the present time?
A. Yes, sir.
Q. Has she refused to deliver possession to you of that land?
A. Yes sir.
Q. You say she still occupies it?
A. Yes sir.
Q. Has your homestead been of record ever since you made it?
A. Ever since the 7th day of May 1900.
Q. Have you ever relinquished it?
A. No sir; I have not.
Q. Have you got a certified copy of the tract book of the land office?
A. Yes sir.

Witness here produces the certified copy of the tract book and the same is marked Exhibit "D" by the court reporter.

Plaintiff here offers in evidence the certified copy of the tract book, marked Exhibit "D."

Defendant objects to the introduction of Exhibit "D" for the reason that it is incompetent, irrelevant, and immaterial.

Offer withdrawn for the present.

Witness excused.

C. W. RANSOM, called on behalf of the plaintiff, being first duly sworn testified as follows:

Direct examination:

Q. State your name?

A. C. W. Ransom.

Q. Are you acquainted with the signature of Mr. Boles, the register of the land office at Perry?

A. Yes sir.

39 Q. Is that his signature? (Referring to Exhibit "D.")

A. I saw him write that signature on the bottom of this instrument and I am acquainted with it.

That's all.

Witness excused.

Mr. RANSOM: We now renew our offer of Exhibit "D."

Defendant objects as incompetent, irrelevant and immaterial, which objection is by the court sustained. To which ruling of the court the plaintiff then and there excepts.

And thereupon the plaintiff rests his case.

KYLE MCCLUNG, called on behalf of the defendant, being first duly sworn testified as follows:

Direct examination:

Q. State your name to the court:

A. Kyle McClung.

Q. Were you acquainted with Charles R. McClung in his lifetime?

A. Yes sir.

Q. Do you know when he died?

A. Two years ago, the 19th of this November coming, I believe is the date.

Q. You may state if you know, whether or not he at any time occupied the southwest quarter of section 30, township 26, range two east the land in controversy in this case?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

A. Yes sir, I know.

Q. You may state if you know, when he began the occupancy of that land?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

40 A. Some time in September 1897.

By the COURT:

Q. 1897?
A. The day of the opening.

By the COURT:

Q. That is in 1893?
A. That's when it was.
Q. You may state if you know, under what circumstances he went upon that land?
A. For a homestead.
Q. You may state if you know whether he continued to occupy that land from that time until the time he died?
A. Yes sir, he did.
Q. Do you know Ida R. McClung, the defendant?
A. Yes sir.
Q. Do you know what relation she sustained to Charles R. McClung?
A. She was his wife.
Q. And now his widow?
A. Yes sir.

Witness excused.

Mrs. IDA MCCLUNG, called on behalf of the defendant, being first duly sworn testified as follows:

Direct examination:

Q. You may state your name?
A. Ida McClung.
Q. You may state what relation you are to Charles R. McClung?
A. Widow.
Q. You may state where you reside?
A. Southwest quarter section 30.
Q. On the land in dispute in this case?
A. Yes sir.
Q. How long have you resided there?
A. Ever since the opening.
Q. You may state why you are still residing upon that land, and what claim you are making to it?

Plaintiff objects as incompetent, irrelevant and immaterial,
41 which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

Q. Why are you still residing on it?
A. As my home.
Q. Are you claiming the land itself, or are you claiming simply its right of possession?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

A. Both.

Q. You may state if it is your purpose at any time in the future or as soon as you can to contest the right of Penny to the title of that land—assert your claim in court as to the title of the land?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

A. Yes sir.
Q. What is the value of that land?

A. Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

Q. If you know the value of the land, state it?
A. Five thousand dollars.

Plaintiff moves to strike out the answer of the witness.

Q. Do you know the value of the land in the vicinity of that?
A. Yes sir.
Q. Now state what it is worth?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff the- and there excepts.

42 A. It is five thousand dollars.

Q. You may state if your husband was a native-born citizen of the United States?

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

A. He was.
Q. Do you know whether he had ever had a homestead or not under the homestead laws, other than this one?
A. No, sir.

Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

Q. You state he never did?
A. No sir, he never did.
Q. State if you know whether or not he ever entered the Cherokee Outlet prior to the sixteenth day of September, subsequent to the President's proclamation?
A. He did not.

Q. Plaintiff objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

Q. What's that?
A. No sir, he did not.

Q. State your age?
A. Twenty-nine.
Q. Are you a native-born citizen of the United States?
A. Yes sir.
Q. Are you qualified to make homestead entry of lands in the Cherokee Outlet?
A. Yes sir.
Q. There was a contest wasn't there, between your husband and Mr. Penny over this land?
43 A. Yes sir.
Q. Have you continued to occupy this land since the termination of that contest for the purposes you have stated?
A. Yes sir.
Q. And are still occupying it?
A. Yes sir.

Cross-examination:

Q. Mrs. McClung, is it not a fact, you own more than 160 acres of land in this county—the title thereto?

Defendant objects as incompetent, irrelevant and immaterial, which objection is by the court overruled. To which ruling of the court the defendant then and there excepts.

A. Yes sir.

Redirect examination:

Q. Have you a family?
A. Yes sir.
Q. What does it consist of?
A. Five children.
Q. All under age?
A. Yes sir.
Q. You are not married at this time?
A. No sir.

Recross-examination:

Q. You are the administrator of the estate of your deceased husband?
A. Yes sir.
Q. And have been since the time an administrator was first appointed?
A. Yes sir.

44 By the COURT:

Q. How much of this land have you in actual possession at this time?
A. About 155 acres.

Witness excused.

Mr. PANCOAST: The defendant offers in evidence the decision of the department, letter A, dated August 24, 1895, marked Exhibit E,

the decision of the Interior Department, marked Exhibit F, the decision of the Department of the Interior, Sept. 24, 1897, marked Exhibit "G," the decision of the Department of the Interior, Aug. 16, 1898, marked Exhibit "H," the decision of the Department of the Interior March 3, 1899, marked Exhibit "I," and the decision of May 1, 1899, marked Exhibit "J."

Mr. RANSOM: To each of which instruments and documents, the plaintiff objects as incompetent, irrelevant and immaterial, and inadmissible.

Which objection is by the court overruled. To which ruling of the court the plaintiff then and there excepts.

Which Exhibit "E," "F," "G," "H," "I," "J" are as follows:

45 Ex. "A."

4–138.

Receiver's duplicate receipt No. 10605. Application No. 10605.

Homestead.

RECEIVER'S OFFICE, PERRY, OKLAHOMA, *May* 7, 1900.

Received of William A. Penny, the sum of fourteen dollars being the amount of fee and compensation of register and receiver for the entry of lots 3 and four & E. ½ S. W. ¼ (or S. W. ¼) of section 30 in township 26 N. of range 1 E. I. M., under section 2290, Revised Statutes of the United States.

JOEL R. SCOTT, *Receiver.*

$14.

Allowed under Commissioner's letter H of April 1900.

NOTE.—It is required of the homestead settler that he shall reside upon and cultivate the land embraced in his homestead entry for a period of five years from the time of filing the affidavit, being also the date of entry. An abandonment of the land for more than six months works a forfeiture of the claim. Further, within two years from the expiration of the said five years he must file proof of his actual settlement and cultivation, failing to do which, his entry will be canceled. If the settler does not wish to remain five years on his tract he can, at any time after fourteen months, pay for it with cash or land warrants, upon making proof of settlement and cultivation from date of filing affidavit to the time of payment.

See note in red ink, which registers and receivers will read and explain thoroughly to person making application for lands where the affidavit is made before either of them.

Timber land embraced in a homestead, or other entry not consummated, may be cleared in order to cultivate the land and improve the premises, *but for no other purpose.*

If, after clearing the land for cultivation, there remains more timber than is required for improvement, there is no objection to the settler disposing of the same. But the question whether the

land is being cleared of its timber *for legitimate purposes* is a question *of fact* which is liable to be raised at any time. If the timber is cut and removed *for any other purpose* it will subject the entry to cancellation, and the person who cut it will be *liable to civil suit* for recovery of the value of said timber, *and also to criminal prosecution* under section 2461 of the Revised Statutes.

46 To Ida McClung:

You are hereby notified and required to quitleave and vacate lots 3 and 4 and east one-half of S. W. ¼ section thirty in township twenty-six north of range one east of the Indian meridian, Kay county, Oklahoma Territory (said tract being in the fractional southwest one-fourth of said section).

That should you fail, refuse or neglect to comply with the requirements of this notice, suit will be brought against you by the undersigned after three days from the delivery hereof to recover possession of any and all portions of said tract still re*tiend* in your possession.

Dated May 9, 1900.

WILLIAM A. PENNY,
Homestead Entryman of said Tract.

Ex. "C."

47 EXHIBIT "E."

"H." S. M. C. P. DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE, WASHINGTON, D. C., *Aug.* 24, 1895. W. A. E. N. W. J. W. W. M. W. D.

Doc. 6, case 8427.

Address only the Commissioner of the General Land Office.

CHAS. R. McCLUNG and WM. PENNY *vs.* P. A. BIRDSELL. } Involving H. E. No. 5963, for the S. W. ¼ Sec. 30, Tp. 26 N., R. 1 E., I. M.

Register and receiver, Perry, Okla.

SIRS: On September 19, 1893, Perry Birdsell made homestead entry No. 209, for the S. W. ¼, sec. 30, tp. 26, N. R. 1 E.

On October 3, 1893, Charles R. McClung filed affidavit of contest against said entry, alleging priority of settlement.

On October 25, 1893, William A. Penny, also filed affidavit of contest against said entry, alleging priority of settlement.

On December 15, 1893, Penny made a motion to intervene in the case of McClung *vs.* Birdsell, and in your letter of September 12, 1894, you state that these cases were consolidated and set for hearing on February 23, 1894, and continued until April 2d, 1894.

On March 21, 1894, Birdsell relinquished all right to this tract and on March 28th, following McClung made homestead entry No. 5963, therefor.

You heard the case between McClung and Penny, on April 27th, and held Penny disqualified. Penny appealed on May 12, 1894.

The disqualification was based upon Penny's having made the race on September 16, 1893, from the Ponca reservation, near
48 where the Arkansas river intersects the north line of said reservation. At the time that said case was first considered by this office, entering from an Indian reservation on the east was not held to disqualify, and so the case was returned by letter "H," of March 11th, 1895 for further hearing.

On May 16, 1895, the department, in the case of Cagle *vs.* Mendenhall, decided that entering from an Indian reservation did disqualify. On June 11th, 1895, both parties appearing by their attorneys, McClung renewed his motion that the contest of Penny be dismissed, and you sustained said motion. Said ruling is in harmony with departmental decision above cited, and is therefore sustained and the contest of Penny is hereby dismissed, subject to appeal.

You will notify both parties hereof.

Respectfully,

E. F. BEST,
Acting Commissioner.

Endorsements: "H" 1953. Aug. 24, 1895–Aug. 27, 1895. Chas. R. McClung & Wm. A. Penny *vs.* P. A. Birdsell, H. E. # 5963, S. W. ¼ 30—26—R. 1 E. Your decision sustained and contest of Penny is dismissed—subject to appeal. Notify both parties.

United States Land Office.

PERRY, OKLA. TER., *October 3rd*, 1900.

I, Alfred H. Boles, register of the United States land office located at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision in the case of Penny *vs.* McClung, now on file in my office. Being acting Commissioner's decision of Aug. 24, 1895.

ALFRED H. BOLES, *Register.*

(Stamp. 10 cts. 10, 3, 1900. A. H. B.)

49 EXHIBIT "F."

S. W. M. DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August* 28, 1896.

CHARLES R. McCLUNG and WILLIAM PENNY
vs.
P. A. BIRDSELL.

The Commissioner of the General Land Office.

SIR: On September 19, 1893, Perry Birdsell made homestead entry for the S. W. ¼ of section 30, T. 26, N. R. 1 E. Perry land district, Oklahoma Territory.

Afterwards, affidavits of contest were filed by Charles R. McClung, and William A. Penny, respectively, each alleging priority of settlement.

On March 21, 1894, Birdsell relinquished all right and interest in the land; and a contest followed between McClung and Penny, McClung alleging that Penny was disqualified, by reason of having made the race on September 16, 1893, from the Ponca reservation.

Your office decision of August 24, 1895, holds that Penny was disqualified, citing in support thereof the departmental decision in the case of Cagle *v.* Mendenhall (20 L. D. 446).

Said decision of your office was correct and is hereby affirmed.

The papers transmitted by your office letter "H," of December 27, 1895, are herewith returned.

Very respectfully, JNO. M. REYNOLDS,
Acting Secretary.

50 4–497.

Refer in reply to this initial, "H."

J. L. M. DEPARTMENT OF THE INTERIOR, M. W. D.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept.* 19, 1896.

Doc. 6, case 8427.

C. R. McCLUNG and WM. PENNY *vs.* P. A. BIRDSELL. } Involving S. W. ¼ Sec. 30, T. 26 N., R. 1 E., Covered by H. E. No. 5963, Formerly H. E. No. 209.

Register and receiver, Perry, Okla.

GENTLEMEN: In reference to the above-entitled case, I enclose herewith a copy of departmental decision of August 28, 1896, affirming the decision of this office, dated Aug. 24, 1895.

Notify all parties in interest of said departmental decision, and if, at the expiration of the time allowed for filing motion for review, (see rules 76, 77, and 78 of practice, circular, 5, L. D. 204) no such motion has been filed in your office and you have not been informed that such motion has been filed here, you will promptly report the fact for final action, transmitting therewith evidence of service of notice of decision of the department.

Respectfully, E. F. BEST,
Ass't Commissioner.

Endorsements: H. 3173, Sept. 19, 1896. Sept. 22, 1896. C. R. McClung & Wm. Penny *vs.* P. A. Birdsell. H. E. 5963, S. W. ¼ sec. 30, T. 26, 1 E. Departmental decision affirming Com'r of Aug. 24, 1895, 30 ds. for filing motion for review.

United States Land Office.

PERRY, OKLA. TER., *October 3rd*, 1900.

I, Alfred H. Boles, register of the United States land office at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision in the case of Penny *vs.* McClung now on file in my office. Being

acting Sec't'y's decision of Aug. 28, 1896 and Comm's letter of Sept. 19, 1896.

ALFRED H. BOLES, *Register.*

Stamp. 10 cts. 10, 3, 1900. A. H. B.

51 EXHIBIT "G."

Vol. 23, No. 586.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *September* 24, 1897.

CHARLES R. McCLUNG and WILLIAM PENNY
v.
P. A. BIRDSELL. } Motion for Review.

The Commissioner of the General Land Office.

SIR: This department, on August 28, 1896, rendered a decision in the case of Charles R. McClung and William A. Penny against Perry A. Birdsell, involving the S. W. ¼ of sec. 30 T. 26, N., R. 1 E., Perry land district, Oklahoma Territory.

The tract described was originally entered under the homestead law by said Birdsell on September 19, 1893.

On October 3, 1893, McClung filed affidavit of contest against Birdsell's entry, alleging priority of settlement.

On October 25, 1893, Penny filed affidavit of contest, alleging priority of settlement; and on December 15, 1893, Penny applied to intervene in the case of McClung *v.* Birdsell. The application was granted, and the cases were consolidated.

On March 21, 1894, Birdsell relinquished all right, title and claim to the land—leaving only Penny and McClung in the case.

On March 28, 1894, McClung made homestead entry of the tract. This ought not to have been allowed while the controversy between him and Penny as to priority of settlement was pending and unadjudicated.

A hearing was had (after several continuances), on April 26, 1894.

At the hearing Penny was his own and only witness. His testimony appeared to show that he was the prior settler; but it
52 also showed that he had made the run into the Territory from the Ponca Indian reservation, east of the land opened to settlement on September 16, 1893.

Penny having rested his case after submitting his testimony, counsel for McClung moved that Penny's contest be dismissed, on the ground that Penny's testimony showed that he was disqualified as an entryman, because of having entered the Territory from the Ponca Indian reservation.

The local officers sustained the motion, and dismissed the contest. Penny appealed to your office.

At that time it was the holding of your office that the fact that a person had made the run into the territory opened to settlement and entry on September 16, 1893, from any Indian reservation on

its eastern boundary, did not disqualify such person from acquiring land in said territory. Your office therefore, on March 11, 1895, remanded the case to the local office for further hearing.

Before the arrival of the time set for such hearing, the department, in the case of Cagle *v.* Mendenhall, (20 L. D. 446) decided that entry from an Indian reservation on the east of the lands opened to entry as above did disqualify.

On June 11, 1895—the day set for the hearing in the case of Penny *v.* McClung—counsel for McClung renewed his motion that the contest be dismissed on the ground that Penny was disqualified. The local officers sustained the motion and dismissed the contest.

Penny appealed to your office—which, on August 24, 1895, affirmed the ruling of the local officers, as being in harmony with the departmental decision in the case of Cagle *v.* Mendenhall (*supra*).

Penny appealed to the department—which, on August 28, 1896, affirmed the decision of your office.

Two motions for review have been filed by Penny's counsel (local and resident, respectively) both earnestly contending that the departmental decision in the case of Cagle *v.* Mendenhall (*supra*)—upon which the several decisions on the case of Penny *v.* McClung have been based—was erroneous.

53 The department has recently, in the case of Brady *et al. vs.* Williams (23 L. D., 533), overruled its former holding in said case of Cagle *v.* Mendenhall, and held that entry from an Indian reservation on the east side of the territory opened to settlement September 16, 1893, does not disqualify a party making the run.

In view of the decision last above mentioned, the department, on January 15, 1897, entertained said motions for review.

Subsequently counsel for McClung filed a motion setting forth in substance the matters hereinbefore stated; directing attention especially to the facts that the local officers granted the motion to dismiss the contest on the ground that the contestant had entered the territory prematurely; that therefore no testimony was offered by McClung in consideration to that introduced by Penny tending to show that the latter was the prior settler; and asking that the case be remanded to the local office in order that such testimony may be taken.

The grounds of said motion would appear to be well taken. The departmental decision of August 28, 1896, is therefore hereby vacated and annulled. The case is remanded for a new hearing, at which both parties will be permitted to submit testimony bearing upon the question of priority of settlement. After such hearing the local officers will render decision in accordance with the facts as they may be made to appear at the hearing.

Very respectfully, WEBSTER DAVIS,
Acting Secretary.

Endorsed: Copy of Sec'y's decision omitted from letter "H," of Oct. 7, 1897. J. L. M.—Mrs. Jennie L. Monroe.

54 Refer in reply to this initial, "H."

J. L. M. DEPARTMENT OF THE INTERIOR, C. C. N.
GENERAL LAND OFFICE, H. W. S.
WASHINGTON, D. C., *Oct.* 7, 1897.

Doc. 6, case 8427
(Address only the Commissioner of the General Land Office:)

C. R. McCLUNG and WILLIAM PENNY
vs.
P. A. BIRDSELL. } Priority of Settlement.

Register and receiver, Perry, Oklahoma.

SIRS: In reference to the above-entitled case, you will find herewith, a copy of departmental decision of Sept. 24, 1897, directing a new hearing in the same, "at which both parties will be permitted to submit testimony *h*earing upon the question of priority of settlement," involving the S. W. ¼, sec. 30, T. 26, R. 1 E., covered by H. E. No. 5963.

Penny's affidavit is herewith returned and you will proceed in the premises outlined by the decision of the department, and in due time report action taken, returning therewith, Penny's affidavit and also transmitting the evidence of service of notice of the decision of the department and your action setting a day for the hearing:

Respectfully,
E. F. BEST,
Ass't Commissioner.

Endorsements: H. 4148. Oct. 7, 1897, Oct. 11, 1897. C. R. McClung and Wm. A. Penny *v.* P. A. Birdsell—H. E. 5963, S. W. 30—26—1 E. Dept. decision of Sept. 24, 1897, returning Penny's affidavit and ordering a hearing.

55 United States Land Office.

PERRY, OKLA. TER., *October 3rd*, 1900.

I, Alfred H. Boles, register of the United States land office at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision of the Secretary of the Interior in the case of Penny *vs.* McClung now on file in my office. Being acting Secretary's decision of review dated Sept. 24, 1897, and Commissioner's letter of Oct. 7, 1897.

ALFRED H. BOLES, *Register.*

Stamp. 10 cts. 10/3/1900. A. H. B.

U. S. LAND OFFICE, PERRY, O. T.

We hereby accept service of the decision of the Commissioner of the General Land Office of date August 16, 1898 in the case of William A. Penny *vs.* Charles R. McClung, and of our right of appeal therein within sixty days from this date Copy this day received.

Dated October 15th, 1898.

MORGAN & PANCOAST,
Att'ys for Charles R. McClung.

56 EXHIBIT "H."

"H." DEPARTMENT OF THE INTERIOR, H. W. S.
GENERAL LAND OFFICE, T. W. A.
W. M. C. WASHINGTON, *August* 16, 1898. L. D. P.

Doc. 6, case 8427.
Address only the Commissioner of the General Land Office.

WILLIAM A. PENNY vs. CHARLES R. McCLUNG. } Involving Title to S. W. ¼, Sec. 20, Twp. 26, R. 1. E. Exhibit "H."

Register and receiver, Perry, Okla.

GENTLEMEN: On September 19, 1893, Perry A. Birdsell made homestead entry No. 209, for the S. W. ¼, sec. 20, twp. 26, R. 1 E.

On October 3, 1893, Charles R. McClung filed his affidavit of contest alleging prior settlement.

On October 25, 1893, William A. Penny also filed affidavit of contest against said entry alleging priority of settlement, and on December 15, 1893, filed his motion to intervene in the case of McClung *vs.* Birdsell.

The two contests were consolidated and a hearing was set for April 2, 1894.

On March 21, 1894, Birdsell relinquished and McClung on March 28, 1894, made homestead entry No. 5963.

Hearing was had between Penny and McClung and you held that Penny was disqualified because he made the race on September 16, 1893, from the Ponca reservation. On March 11, 1895, this office held that entering the Territory from the reservation did not disqualify Penny and remanded the case for a hearing on its merits.

On May 16, 1895, it was held by the department in the case of Cagle *vs.* Mendenhall (20 L. D. 447) that entering from an
57 Indian reservation disqualified a settler.

On June 11, 1895, when the case was called for a further hearing McClung renewed his motion to dismiss Penny's contest, which was sustained and your decision was affirmed by this office on August 24, 1895.

On appeal the department affirmed the decision of this office dismissing the contest.

On a motion for review the department on September 24, 1897, reversed its former decision and ordered a hearing on the merits of the case to determine the rights of the parties.

The said hearing was had on March 17, 1898. You found that Penny was the prior settler, had established and maintained his residence on the land and, thereupon you recommended that McClung's entry be canceled.

The evidence shows that Penny on September 16, 1893, entered the Territory from the Ponca reservation and reached the land in dispute a few minutes prior to one p. m.; that he stuck a stake, dug a hole and threw up a mound; he remained on the tract until next

morning, selected a place for a dugout and left for the local office to make entry; he returned to the land September 19, commenced the excavation of a dugout and left the claim on September 20; before leaving he employed two men to work on his dugout; he returned on the 22nd and helped to work on his dugout and in the course of a week it was built up three logs high, with the exception of one side, when he left for Kansas to get some lumber for the roof; Penny worked on the dugout at intervals until it was finished. He brought his family to the land, November 17, 1893. He moved to the claim some kitchen and household furniture. He was living on the claim at the time of the first trial in April 1894, and continued to live there until August 1894, when he went with his family to Kansas where he remained until February 1895. After February 1895, Penny's family was on the land at intervals.

The testimony is not definite as to the time Penny was actually on the land, with the exception of one or his witnesses who testifies that Penny left the land after his return in February 1895,
58 on March 17, 1895, and returned June 2; again left June 18, and returned November 6. Again left in May and returned October 17, 1896; that from October 17, 1896, to June '97, the family were on the land; that in June '97, they left the land and were absent about two months. Since their return in September they had lived on the land. The evidence shows that Penny was on the land perhaps one-third and his family one-half of the time from February '96 to September '97. In September '97, Penny built a house and since that time his residence has been continuous.

It appears that as early as October 3, 1893, McClung had fenced in with wire all of the land except Penny's dugout, which was on the edge of the claim and partly in the road and that Penny had been restrained by order of court from entering the inclosure. Penny had applied to the court for a part of the land, but it seems he did not successfully prosecute his claim or allowed, by default, an injunction against him to be made perpetual or until the rights of the parties were settled by the department.

Penny had no horses or implements of husbandry on his claim; these he kept in Kansas where for three seasons he cultivated crops. His reason for this is that he had no land to cultivate or to erect suitable buildings upon to keep them.

The evidence shows that McClung made his first settlement on the land September 19, 1893, by sticking a stake and throwing up a mound. He and his witnesses testify that he placed a tent on the northeast corner. This tent was blown down and again set up the next morning. He immediately commenced his improvements and on October 3, had practically the whole of the land fenced in, his house built and within a week thereafter he established his residence which he has since maintained. He has made improvements aggregating in value with the money he paid for Birdsell's relinquishment about $1000.

Prior to September, 1897, the only improvements Penny had on the claim was his dugout. He was fenced out or off the claim, and by order of court he was enjoined from entering thereon.

59 Penny was dilatory in completing his dugout and getting his family on the claim, but when it is considered he was off and on there at intervals working upon his dugout, it would not be a just conclusion upon the facts to hold that he did not establish a residence on the land until November 17, 1893, when he moved his family to the claim.

It is contended that Penny after August 1894, did not maintain his residence on the land. In the presence of an adverse claim, the rulings require the maintenance of actual residence by the settler who relies on his prior settlement. McInnes *vs.* Cotter, 21 L. D. 97; Foote *vs.* McMillan 22 L. D. 280; Benjamin *vs.* Endaily, 25 L. D., 103; Thompson *vs.* Craver, 25 L. D. 279; and Griffin *vs.* Smith, 25 L. D. 329.

The continuity of the prior settler's residence cannot be broken except at the risk of loss of any prior or superior right he may possess over and adverse settler. In Thompson *vs.* Craver (*supra*) it was held the prior settler "must stand upon his settlement—the allegation of superior rights to the other parties to the cause—and so alleging it is incumbent upon him not only to show settlement but continuous residence thereon."

Subsequent to August 1894, it cannot be said that Penny has complied with the law under these rulings. He offers as an excuse that it was impossible to earn a support on the land as he had none to cultivate; that all the agricultural land having been fenced in by McClung and an injunction having been issued against his entrance into the inclosure, he was compelled to go elsewhere to find land he could cultivate.

The unfair dealing of McClung should estop him in urging a forfeiture of Penny's superior right to the land by reason of his absences therefrom, for doubtless McClung's acts contributed thereto if they did not occasion Penny's absences. However, if they did not, following the ruling in the case of Brady *vs.* Williams, (23 L. D., 532; and 25 L. D., 55 and 402) made on a motion for rehearing but not reported in full, the department said:

"It is hardly to be expected under the circumstances surrounding this case that Brady should be required to spend all his time
60 on the land. Under the ruling in Cagle *vs.* Mendenhall (20 L. D. 447) which controlled the question at issue in the case at bar, until overruled, there was but little incentive to those who made the race from the east side of the Outlet to do more in the way of residence and improvement than a compliance with the terms of the law, with the view of preserving their rights until the question should be finally determined."

This ruling is directly pertinent to the case under consideration. Under it Penny must be held as having complied with the law as to his residence. It being found that Penny was the first settler, that he established his residence on the land within a reasonable time and that he has maintained his residence thereon, it must be declared that he has the superior right. Your decision is therefore affirmed and in the event of this decision becoming final, McClung's entry will be canceled and Penny allowed to make entry of the land.

Notify the parties hereof and McClung of his right of appeal.

Respectfully, F. W. MONDELL,
Act'g Commissioner.

Endorsements: "H," 4731. August 16, 1898–August 19, 1898. William A. Penny *vs.* Charles R. McClung, for the S. W. ¼, sec. 30, 26,—R. 1 E. Decision of G. L. O., of August 16, 1898. Affirming decision of local office, subject to McClung's appeal.

United States Land Office.

PERRY, OKLA. TER., *October* 3, 1900.

I, Alfred H. Boles, register of the United States land office at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision of the Commissioner of the General Land Office in the case of Penny *vs.* McClung, now on file in my office. Being acting Commissioner's decision of Aug. 16, 1898.

ALFRED H. BOLES, *Register.*

Stamp. 10 cts. 10/3/1900. A. H. B.

61 EXHIBIT "I."

Vol. 26, No. 658.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *March* 3, 1899.

WILLIAM A. PENNY
vs.
CHARLES R. McCLUNG. } Contest of Homestead Entry.

The Commissioner of the General Land Office.

SIR: On September 19, 1893, one Charles Birdsell made homestead entry for the S. W. ¼ of sec. 30, T. 26, N. R. 1 E. Perry land district, O. T.

On October 3, 1893, Charles R. McClung filed affidavit of contest against Birdsell's entry, alleging priority of settlement.

On October 25, 1893, Penny filed affidavit of contest, alleging priority of settlement; and on December 15, 1893, he applied to intervene in the case of McClung *v.* Birdsell. The application was granted, and the cases were consolidated.

On March 21, 1894, Birdsell relinquished all right, title, and claim to the land—leaving only Penny and McClung in the case.

On March 28, 1894, McClung made homestead entry of the land, (which the local officers ought to have allowed while the controversy between him and Penny as to priority of settlement was pending and unadjudicated.)

A hearing was had, (after several continuances) on April 26, 1894.

At said hearing Penny was his own and only witness. His testimony appeared to show that he was the prior settler; but it also showed that he had made the run into the Territory from the Ponca

Indian reservation, east of the land opened to settlement on September 16, 1893.

Penny having arrested his case after submitting his testi-
62 mony, counsel for McClung moved that Penny's contest be dismissed, on the ground that his own (Penny's) testimony showed that he was disqualified as an entryman, because of having entered the Territory from the Ponca Indian reservation. The local officers sustained the motion and dismissed the contest.

Penny appealed; but your office, on August 24, 1895, and the department on August 28, 1896, sustained the action of the local officers, upon the grounds set forth in departmental decision of Cagle *v.* Mendenhall (20 L. D., 446).

A motion for review was filed, which was pending when the ruling in said case of Cagle *v.* Mendenhall was reversed in the case of Brady *v.* Williams (23 L. D. 533), which held, that entry from said Indian reservation did not disqualify a party making the run therefrom.

In view of said last-named ruling, the department, on September 24, 1897, remanded the case of Penny *v.* McClung to the local office, in order that McClung might be allowed to submit testimony tending to show that he was the prior settler.

The hearing for the purpose thus indicated has been had—beginning January 6, 1898. As the result of said hearing the local officers found in favor of Penny, and recommended that McClung's homestead entry be canceled.

McClung appealed to your office; which, on August 16, 1898, affirmed the decision of the local officers. McClung has appealed to the department.

The numerous grounds of error alleged by the appellant may be summed up in the following:

First. It was error to hold that Penny was the earlier legal settler; *i. e.* that his acts in connection with the land, prior to the date of McClung's settlement, were sufficient to initiate a claim to the land.

Second. It was error not to hold that Penny failed, in the presence of the adverse claim of McClung, to maintain residence and made improvements upon the land as required by law.

63 Penny's testimony relative to his arrival and the improvements made by him immediately thereafter is as follows:

I arrived on the tract three minutes before one o'clock; I stuck a stake, tied my handkerchief on the stake, dug a hole, and threw up a mound; later on in the evening I dug off, on the bank of the river, twenty or thirty spades of dirt, where I expected to start a dugout; and in the evening or at night I used to go down the hill to get my horses to water, and others used it for the same purpose; then I thought it would be the best place to make a road to get down to the river; and so, *later on*, I marked out where I intended to dig my dugout; *it was on Wednesday*, September 20; I left word for Mr. Webb, and Mr. Coffelt, and others, to start my dugout there.

Penny does not state at what time of day on Wednesday he marked out where he intended to make his dugout; but this infor-

mation is supplied by witness, McBride, who testifies that Penny marked off the ground, and he and Coffelt began digging about ten o'clock Wednesday morning.

The local officers in their decision say regarding Penny; "During the evening of the 16th he dug off the bank of the river twenty or thirty spades of dirt, *at a point where* he afterwards started a dugout." His own testimony, hereinbefore quoted, shows that such was not the case; he also testifies elsewhere to the same effect thus:

Q. State just what the condition of your dugout was when you came back on the evening of the 19th—what has been done to it:

A. There hadn't been anything done to it; it wasn't started nor marked out until the morning of the 20th.

McClung testifies that he went upon the land on the day of the opening (September 16, 1893); that on that day he laid no claim thereto, as he found signs of settlement thereon—to wit, a few sods piled up near one corner, and a stake to which was attached a piece of paper bearing the name of Smith. McClung and several of his family kept a watchful eye on the tract for several days; and seeing no one upon it or apparently laying claim to it, and no improvements made, he concluded that if any one ever had claimed, such party had abandoned it, and on Tuesday, September 19th, he went upon the land, drove a stake, wrote his name upon it, attached a piece of white cloth to it, dug a hole near it, and with the dirt taken from the hole piled a mound about the stake. About four o'clock of the same day he put up a tent, in which he put some bed clothing, cooking utensils, and other articles. That evening the
64 tent blew down, and McClung went to his cousin's tent and stayed all night; but on Wednesday morning, September 20th, about eight o'clock, he again put up the tent—which was his home from that time until he built his house. During the day he learned that lumber could be had at White Eagle, a dozen miles away; on Thursday, September 21, he bought lumber for a house, brought it to the land, and started a foundation Thursday evening; worked on it all day Friday, and by Saturday night, September 23, had it completed excepting part of the shingles on the roof, he then went to Kansas after his family, who came to the land in controversy and took up their residence in the house built upon it some time in the first week of October.

The preceeding statement is not only that of the defendant McClung, himself, but that of the parties who assisted him in putting up his tent Tuesday afternoon and Wednesday morning, or who saw them.

Kyle McClung, at whose tent the defendant stayed from the day of the opening until Tuesday, testified that the latter took his tent from the witness's place, adjacent to the tract in controversy, to said tract, and put it up Tuesday afternoon, about four or five o'clock; the wind was very high, and it blew down; defendant stayed all night at witness's tent, but early next morning, about eight o'clock, went over and re-erected his tent.

Fielding McClung testified to helping put up the tent Tuesday

afternoon; did not assist in putting it up again on Wednesday morning, but saw it soon after it was re-erected.

Walter F. McClung testified to seeing the defendant put up the tent Tuesday afternoon, and to seeing it again, standing about eight or nine o'clock the next morning.

Charles Smith testified that he rode by the tract in controversy, on his way to the Tonkawa reservation, on Tuesday evening, about sunset, and saw a tent on the tract in controversy, partly blown down; returning the next morning, he rode by the place about nine o'clock, and the tent had been re-erected.

65 J. W. Up Dyke testified to riding into the Tonkawa reservation with the last-mentioned witness, and corroborated his statements as to the tent.

Park Bridges has a deposition in the case, in which he states that he assisted McClung in putting up his tent Tuesday afternoon, and again Wednesday morning.

McClung and his family continued to reside upon the tract until the hearing. His improvements are correctly set forth by the local officers as follows:

He has a three-room house, a cellar, a stable and barn 24 x 24 feet, corn crib and bin 24 x 12, another bin which holds five hundred bushels; smoke-house, three acres in orchard; half an acre in shade trees; about sixty acres in pasture; five or six acres in hog lot; has cultivated in various ways as above set forth, together with ordinary crops, about one hundred acres of land. He has practically the entire claim under fence.

He paid Birdsell two hundred and ninety-five dollars for Birdsell's relinquishment; his improvements have cost him over seven hundred dollars; thus making his entire expenditure for and upon the land more than one thousand dollars.

The local officers find also that—

Prior to September, 1897, the only substantial improvement Penny had on this land was the dugout, which he and his family resided in at intervals since the opening of the Outlet. He has kept on the place no domestic animals for any length of time, nor any implements that are necessary for farming purposes. The most of this kind of property he has kept with him in the State of Kansas, at the place where he has cultivated crops. Penny gives as a reason for failing to make any other and more extended improvements and cultivation of the land, the fact that McClung had secured a restraining order in the district court, confining to him the small portion of land immediately around his house and along the creek banks, which was unsuited for agricultural purposes. His dugout is situated in the public road; he had no land suitable for building purposes; and none on which he could erect or construct fences or corrals to hold stock. It appears that Penny made no effort to dissolve the restraining order secured against him by McClung.

Penny's entire expenditure upon the land up to the date of hearing would appear to have been from twenty-five to forty dollars.

In view of the facts above set forth your office holds that McClung's conduct should estop him from urging a forfeiture of Penny's superior

right to the land by reason of his absences therefrom, and decides adversely to McClung, basing such action largely upon the
66 departmental decision of November 23, 1897, in the case of Brady *v.* Williams on motion for rehearing (not reported; see 25 L. D. 402.) In said decision the department said:

It is hardly to be expected under the circumstances surrounding this case that Brady should be required to spend all his time on the land. Under the ruling in Cagle *v.* Mendenhall (20 L. D. 447) which controlled the question at issue in the case at bar, until overruled, there was but little incentive to those who made the race from the east side of the Outlet to do more in the way of residence and improvements than a compliance with the terms of the law, with the view of preserving their rights until the question should be finally determined.

Your office finds that Penny was the first settler, that he established residence thereon within a reasonable time, and that, in the light of the foregoing departmental decision, he "must be held as having complied with the law as to his residence."

Counsel for Penny contend, in relation to McClung's placing of a tent upon the land as an act of settlement:

Conceding McClung's settlement as he claims it in his own testimony, it was first initiated at 4 p. m., September 19, 1893. At that time the homestead entry of Perry Birdsell was of record in the Perry land office. This is a very important fact in this case; for McClung could take nothing under a settlement made upon land segregated by homestead entry.

The department has frequently held, as in the case of Geer *v.* Farrington, (4 L. D., 410, syllabus):

Conceding that, while an entry stands uncanceled upon the record, settlers upon the land covered thereby acquire no rights as against the record entryman or the United States, yet as between such settlers, priority of settlement may be properly considered.

Birdsell relinquished all claim to the tract in controversy a few days after filing therefor; thereupon the land became subject to settlement and entry, and priority of settlement may properly be considered in determining the rights of claimants who were then upon the land.

It was incumbent upon Penny to follow his initial act of setting a stake and flag, digging a small hole, and throwing up a diminutive mound, on the day of the opening, within a reasonable time, by additional acts evidencing an intention to make a *bona fide* settlement. The act of throwing a few shovelfuls of dirt from the edge of the river bank, making less steep the slope down which
67 Penny and his neighbors led their horses to water, was not such an act as would evidence his intention to make a homestead settlement. He testifies that he was on the tract in person at four o'clock p. m. of the 19th of September, when McClung, according to the latter's testimony and that of several witnesses, put up a tent on the land in controversy. Counsel for Penny strongly intimate doubt as to whether McClung actually put up a tent on the 19th. However that may be, there is abundance of testimony that

he had a tent on the land at eight o'clock, or between eight and nine o'clock on September 20; and there is no witness who places the first stroke of work done toward building Penny's dugout earlier than ten o'clock on that day. Penny's conduct in connection with the land for years afterwards, according to the testimony of his own witnesses, disclosed an intention to do as little as possible and make a merely colorable compliance with the requirements of the homestead law. The quotation made by his counsel from the decision in the case of Brady *v.* Williams, on petition for rehearing (*supra*), that "there was but little incentive to those who made the race from the east side of the Outlet to do *more* in the way of residence and improvement, *than a compliance with the terms of the law*," cannot be extended to cover a case where the claimant has done far less than would constitute a compliance with the terms of the law. The restraining order to which reference is made in the decision of the local officers, is not a matter which can operate to excuse the failure of Penny to comply with the law, when the circumstances surrounding the making of that order are understood. Penny had instituted a suit in the local court against McClung involving the possession and occupancy of the land by these two rival claimants, and at the time fixed for the interlocutory hearing Penny did not appear, but made default; and upon the cross-petition of McClung and the showing made in support thereof, Penny was enjoined and restrained from interfering with the enclosure, property and improvements of McClung upon—the tract in dispute prior to the determination of the respective claims of the parties by the Land Department,
68 Penny never sought a vacation or modification of this restraining order, although it was the practice of the local courts, upon proper showing (judging from the numerous cases referred to in the testimony) to divide the possession and use of the land in controversy between opposing claimants.

In the case at bar, the register who signed the local officer's decision is not the register before whom the testimony was taken; and the question in issue is one of mixed law and fact.

The decision of your office holding McClung's entry for cancellation is hereby reversed, and Penny's contest is dismissed.

The papers transmitted by your office letter (H) of October 18, 1898, are herewith returned.

Very respectfully, E. A. HITCHCOCK, *Secretary.*

E. R. B.

Before the United States Land Office, Perry, Okla.

MAY 24TH, 1899.

We hereby accept service of notice of departmental decision dated March 18, 1899, in the case of William E. Penny, *v.* C. R. McClung, involving the S. W. ¼ sec. 30, T. 26, R. 1, E. by receipt of a true and correct copy of the same, on above date.

RANSOM & BAILEY,
Att'ys for Plaintiff.

——— ———,
Att'ys for Defendant.

69 4-497.

Refer in reply to this initial, "H."

J. L. M.
Doc. 6, case 8427.

DEPARTMENT OF THE INTERIOR, H. W. S.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 18, 1899.

WM. A. PENNY
vs.
C. R. MCCLUNG.

Involving H. E. No. 5963, S. W. ¼, Sec. 30, T. 26 N., R. 1 E.

Register and receiver, Perry, Oklahoma.

GENTLEMEN: In reference to the above-entitled case, I inclose herewith a copy of departmental decision of March 3, 1899, reversing the decision of this office, dated August 16, 1898.

Notify all parties in interest of said departmental decision, and if, at the expiration of the time allowed for filing motion for review (see rules 76, 77, and 78 practice, circular 5 L. D. 204) no such motion has been filed in your office, and you have not been informed that such motion has been filed here, you will promptly report the fact for final action, transmitting therewith evidence of service of notice of decision of the department.

Resident counsel for both parties have been notified hereof. You will so advise Penny or his attorney, and that the time for him to file a motion for review will begin to run on this date.

Respectfully, BINGER HERMANN,
Commissioner.

Endorsements: "H" 5119, (M'ch 18" 1899 M'ch 21, 1899)—William A. Penny *vs.* C. R. McClung. S. W. ¼ sec. 30, T. 26, R. 1 E.—Departmental decision of March 3" 1899 reversing the decision of G. L. O. dated August 16", 1898. Doc. 1 P. 79.

United States Land Office.

PERRY, OKLA. TER., *October* 3*rd*, 1900.

I, Alfred H. Boles, register of the United States land office at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision of the Secretary of the Interior in the case of Penny *vs.* McClung now on file in my office. Being Secretary's decision, dated M'ch 3, 1899 & Commissioner's dated M'ch 18, 1899.

ALFRED H. BOLES, *Register.*

(Revenue stamp. 10 cts.)
10/3/1900. A. H. B.

70 EXHIBIT "J."

Vol. 26, No. 658.

Motion for Review.

WILLIAM A. PENNY
v.
CHARLES R. MCCLUNG.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *May* 1, 1899.

The Commissioner of the General Land Office.

SIR: William A. Penny has filed a motion for review of departmental decision of March 3, 1899 (unreported), dismissing his contest against the homestead entry of Charles R. McClung, made March 28, 1894, for the S. W. ¼ of sec. 30, T. 26, N. R. 1 E., Perry, land district, Oklahoma Territory.

The facts of the case are fully set forth in said departmental decision complained of, and need not be herein repeated.

The numerous specifications of error may be summed up in the allegations that Penny's acts prior to McClung's settlement upon the land were sufficient to defeat the acquirement of any right thereto by McClung; that Penny's conduct in connection with the land for years after McClung's settlement and establishment of residence was not a proper subject for consideration by the department; that "the facts are notorious that Penny has been a *bona fide* settler upon this tract, claiming the same as his home since the day he originally claimed settlement, September 16, 1893;" and that the "restraining order" obtained by McClung should be considered a sufficient excuse for Penny's not residing upon, cultivating, and improving the land.

These allegations were presented to and considered by the department when the case was before it on appeal; and no reason now appears for arriving at a different conclusion with reference thereto than was enunciated in the decision heretofore rendered.

Certain of the allegations may very properly receive sepa-
71 rate consideration, to wit:

Inasmuch as there is no question but that Penny was the prior settler, it was error not to have awarded him the land:

Inasmuch as * * * all concur *that McClung was not the prior settler*, it was error not to have decided the case upon that point and awarded the land to Penny:

It was error to have considered the acts of McClung made upon land *which he had illegally and erroneously withheld from the use and occupation of Penny*, as evidence of a superior right.

These allegations beg the very question in issue—laying down premises which the department has held to be without foundation in fact. The department has found that Penny was not the prior settler; that McClung was the prior settler; that as Penny had failed

to initiate any claim to the land prior to McClung's settlement thereon; the restraining order procured by the latter was not "illegally and erroneously," but legally and properly issued.

The motion alleged further:

It was error not to have considered that Charles R. McClung testified in the case of McClung *v.* Winebrenner, that he was helping his brother build a house on September 21, 22, and 23.

The fact (if it was a fact) that McClung was helping his brother build a house on the days mentioned, would not prove that the testimony of the defendant and his witnesses (Charles R. McClung, Kyle McClung, Fielding McClung, Walter F. McClung, Charles Smith, Park Bridges, and J. W. Updyke) was false when they testified to assisting in erecting McClung's tent, or seeing it erected, on the land in controversy, between eight and nine o'clock on the morning of September 20 which was before Penny, according to his own testimony and that of his witnesses, had even marked out where he intended to construct his dugout.

The motion alleges further:

It was error to hold that cost of the entire improvements Penny has placed upon the land does not exceed twenty-five or forty dollars, whereas such cost largely exceeded two hundred dollars.

After the department (on September 24, 1897), remanded this case to the local officers for a further hearing, Penny hastened to make quite extensive improvements upon the land. But the local
72 officers (who found in favor of Penny) in their decision state that, prior to September 1897, the only substantial improvements Penny had made was the dugout—and that the dugout was not situated upon the land but in the public road. The finding of the local officers in this respect is fully sustained by the evidence.

It will be seen that the motion raises no question that was not presented to and considered by the department when the case was before it on appeal; and no reason appearing why the decision heretofore rendered should be disturbed, the motion is hereby denied, and herewith transmitted for the files of your office.

Very respectfully, E. S. HITCHCOCK, *Secretary*.

E. R. B.

Refer in reply to this initial, "H."

J. L. M. DEPARTMENT OF THE INTERIOR, H. W. S.
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 8, 1899.

Doc. 6, case 8427.

Address only the Commissioner of the General Land Office.

WM. A. PENNY *vs.* C. R. McCLUNG. } Involving S. W. ¼, Sec. 30, T. 26 N., R. 1 E., Covered by H. E. No. 5963.

Register and receiver, Perry, Oklahoma.

73 GENTLEMEN: In reference to the above-entitled case, I inclose herewith a copy of the decision of the honorable Secre-

tary of the Interior, dated May 1", 1899, denying the motion for review of departmental decision of March 3", 1899, which was in favor of McClung.

Said case is accordingly hereby closed. Notify the parties in interest.

The entry remains intact.

Respectfully,

BINGER HERMANN,
Commissioner.

Endorsements: (May 11, 1899. "H" 5244. May 8", 1899.) S. W. ¼, sec. 30, T. 26, R. 1 E. Department decision of May 1", 1899, denying motion for review of departmental decision of March 3", 1899, in favor of McClung—case closed, and entry remains intact.—William A. Penny *vs.* Charles R. McClung.

United States Land Office.

PERRY, OKLA. TER., *October* 3, 1900.

I, Alfred H. Boles, register of the United States land office lolated at Perry, Oklahoma Territory, do hereby certify that the above and foregoing decision is a true and exact copy of the original decision in the case of Penny *vs.* McClung, now on file in my office. Being Secretary's decision on motion for review, and Commissioner's letter dated May 8, 1899.

ALFRED H. BOLES, *Register.*

Revenue stamp, 10 cts. 10, 3, 1900. A. H. B.

74 And thereupon the defendant rests her case and the plaintiff rests his case, and this was all the testimony offered.

TERRITORY OF OKLAHOMA, } *ss:*
Kay County, }

I, Eugene F. Blaise, official court reporter of the district court of the fourth judicial district, Territory of Oklahoma, hereby certify that as such court reporter I took the proceedings in case No. 1622, William Penny *v.* Ida McClung, and that the above and foregoing is a true and correct transcript of the notes taken by me of the testimony of witnesses, the objections of counsel, rulings of the court, and exceptions thereto, except Exhibits A, B, and C.

EUGENE F. BLAISE,
Court Reporter.

Thereupon, after hearing the evidence and the arguments of counsel, the court found the issue in said cause in favor of the plaintiff. And on the said 26th day of October, A. D. 1900, rendered judgment that the plaintiff have restitution of the premises described in his complaint, and for costs of suit.

Thereupon on the said 26th day of October, A. D. 1900, the defendant filed her motion for a new trial in said cause; which said motion was in the words and figures as follows, to wit:

75 In the District Court of Kay County, Oklahoma Territory.

WILLIAM A. PENNY
vs.
IDA MCCLUNG. } Motion for a New Trial.

Now comes the above-named defendant and moves the court to set aside the decision and findings of the court and grant a new trial in this cause for the following reasons, to wit:

(1.) For that the decision is not sustained by sufficient evidence and is contrary to law.

(2.) For error of law occurring at the trial and excepted to by the defendant.

J. L. PANCOAST AND
S. H. HARRIS,
Attorneys for Defendant.

That thereafter, on the said 26th day of October, A. D. 1900, the above and foregoing motion for a new trial came on to be heard before the court. And after hearing the parties and giving the matter due consideration, and the court being advised in the prem-ses, said motion for a new trial was overruled by the court. To which ruling of the court the defendant then and there duly excepted. A journal entry of said proceedings, orders, and judgments in said cause is in the words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma Territory.

WILLIAM A. PENNY, Plaintiff,
vs.
IDA MCCLUNG, Defendant. } Journal Entry.

76 Now on this 26th day of October, A. D. 1900, the above and foregoing cause came on to be heard before the court, a jury having been waived therein, the plaintiff appearing in person and by his attorneys, C. W. Ransom, and J. F. King, and the defendant appearing in person and by her attorneys, J. L. Pancoast and S. H. Harris; and thereupon each of the said parties having submitted their evidence and the court being fully advised in the premises, the court finds the defendant guilty as charged in the complaint.

It is therefore ordered, and adjudged by the court that the plaintiff do have restitution of the premises described in his complaint, viz; the southwest quarter of section 30, in township 26, north of range 1 east, I. M. in Kay county, Oklahoma Territory, and the costs of this suit, to be taxed by the clerk of this court. To which judgment, and each and every part thereof, the defendant then and there excepted.

Thereupon on the said 26th day of October, A. D. 1900, the defendant Ida McClung, filed her motion for a new trial in said cause, and said motion coming on to be heard on said day, and after due consideration thereof said motion for a new trial is by the court over-

ruled. To which ruling of the court in overruling the said motion for a new trial, the defendant then and there duly excepted.

Thereupon upon the application of the said defendant, and for good cause shown, the defendant herein, Ida McClung, is granted ninety days from this date, the 26th day of October, A. D. 1900, within which to make and serve a case-made in said cause for the Supreme Court, and the said plaintiff, William A. Penny, is granted twenty days from the time said case-made is served, within which to suggest amendments to such case-made. And it is ordered that the said case-made, together with any amendments that may be suggested, shall be presented for settlement and certification upon five days' notice in writing, of the time and place where said case will be presented for settlement. And upon application of the said defendant, it is ordered that the judgment of restitution herein shall be stayed for a period of thirty days from this date, as to all of said land, except about forty acres in the southwest portion thereof, more particularly described as follows, to wit: Commencing at the
77 southwest corner of said quarter section, and running thence east 67 rods, thence north 100 rods, thence west 67 rods, and thence south 100 rods, to the place of beginning, except that portion within said boundaries occupied by the hog pens of the defendant; and if the said defendant, shall within such time file with the clerk of this court a supersedeas bond in the sum of $1000, conditioned as required by law, then and in that case the said judgment of restitution shall be stayed as to that portion of land above specified, for a period of twenty days after the said case-made shall be signed and settled, in order to enable the defendant to have sufficient time to file said case-made and his petition in error in the Supreme Court.

BAYARD T. HAINER, *Judge.*

O K.
RANSOM & BAILEY,
Att'y- for Plaintiff.

O K.
J. L. PANCOAST,
Att'y for Defendant.

Filed Apr. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

The above and foregoing record contains all of the pleadings, motions, orders and the evidence in said cause.

We, the undersigned attorneys for the plaintiff in the above-entitled cause, do hereby acknowledge due service of the above and foregoing case-made for the Supreme Court, this 19th day of January, A. D. 1901

RANSOM & BAILEY,
Attorneys for Plaintiff.

Filed, Apr. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

78 On this the 18 day of March 1901, we the undersigned attorneys for plaintiff in the above-entitled cause do hereby waive the five days' notice in writing of the time and place where the said case-made will be presented for settlement and certification, and agree that the same may be presented at Newkirk, O. T. for settlement on this day without further notice.

RANSOM & BAILEY,
Attorneys for Plaintiff.

Filed Apr. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
Noble County, }

Be it remembered that on this 18 day of March, A. D. 1901, the above and foregoing case-made was submitted to the undersigned judge of the district court within and for the fourth judicial district of the Territory of Oklahoma for settlement and certification, the defendant appearing by his attorney, J. L. Pancoast, and the plaintiff appearing by his attorneys, Ransom & Bailey, and there being no suggestions of amendment, upon examination and determination I find that said record is a true and correct record of the trial and all the proceedings in said cause, and hereby sign, settle, and approve the same as and for a case-made for the Supreme Court, and I do hereby certify that said record contains all the pleadings, motions, demurrers, findings, evidence, judgment and proceedings had at the trial of said cause. And it is ordered that the said case-made be attested by the clerk of this court, and filed as a part of the records of said cause, and after being filed the same shall be returned to the defendant to be filed in the Supreme Court.

Witness my hand at Perry, in said county and Territory, the day and year last above written.

BAYARD T. HAINER,
Judge of the District Court.

Attest: JAY E. PICKARD,
Clerk District Court,
By E. A. BURKE, *Deputy.*

Filed Apr. 15, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

79 1085. Ida McClung *vs.* Wm. A. Penny. Petition in error and case-made. Filed in district court of Kay county, Oklahoma, this 18th day of March, 1901. Jay E. Pickard, clerk, by E. A. Burke, deputy. Filed, Apr. 15, 1901. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

80 And thereafter at the June, 1901, term of said supreme court, on the third day of June, 1901, the following proceedings were had in said cause, to wit:

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } # 1085.

Ordered by the court that this cause be now submitted on briefs and stipulation.

81 And thereafter to wit, at the June, 1901, term of said supreme court, on the fourth day of June, 1901, the following proceedings were had in said cause, to wit:

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } # 1085.

Ordered by the court: That leave be and the same is granted to defendant to file briefs; and oral argument is waived.

82 And thereafter, to wit, at the June, 1902, term of said supreme court, on the fifth day of June, the following proceedings were had in said cause, to wit:

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } # 1085.

And now this cause comes on for final determination by the court upon the record, briefs and stipulations submitted herein.

And the court having examined the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is now therefore hereby ordered and adjudged by the court: That the judgment of the lower court in this cause be and the same is hereby affirmed at the cost of plaintiff in error.

Opinion by Irwin, J., all the justices concurring, except Justice Hainer, who tried the cause below, and Justice Pancoast who was counsel in the cause below, not sitting.

83 Which said opinion reads in words and figures as follows, to wit:

84 In the Supreme Court of the Territory of Oklahoma, June Term, 1902.

Filed June 5, 1902.

IDA McCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } No. 1085.

Syllabus.

1. Where a complaint in forcible entry and detainer is filed, which is sufficient on its face, the fact that it contains the allegation that the plaintiff is the owner of the premises therein described, will be treated as descriptive of his right of possession, and not as raising the question of title. Inasmuch as the question of title cannot be raised or tried in an action of forcible entry and detainer, the filing of an answer setting up title, or claiming an equitable right to declare a resulting trust, will not divest the probate court of jurisdiction.
2. *Jurisdiction of probate courts in forcible entry and detainer*, by article 15, chapter 18, section 1562, Statutes of 1893, reads:—

"Probate courts in their respective counties shall in addition to the powers conferred upon them by the probate chapter of the Territory have and exercise all the ordinary powers and jurisdiction of justices of the peace."

By this provision, jurisdiction is given of the action of forcible entry and detainer, as forcible entry and detainer is one of the ordinary powers of justice of the peace.

Error from the district court of Kay county, Bayard T. Hainer, trial judge. Affirmed.

Pancoast and Bowles and S. H. Harris, for the plaintiff in error.
Ransom and Bailey and J. H. King, for the defendant in error.

Statement of Facts.

This is an action commenced by the defendant in error in the probate court of Kay county, Oklahoma Territory, and is an action of forcible entry and detainer to recover the possession of the S. W. ¼ of section 30, twp. 26, north of range 1 east. The facts are
85 that defendant in error and one Charles R. McClung, the husband of plaintiff in error, both claimed this tract of land as homestead settlers, and contested for their rights as such, through the several Departments of the Interior, to a final determination, which was in favor of defendant in error, who, having completed his entry, brought this action to obtain possession of the land. The defendant files a general denial, and also sets up by way of answer that the Land Department and the Secretary of the Interior misapplied the law in the case, and that the defendant in error was not a qualified entryman, and alleges that she, the plaintiff in error intends to bring an action to declare the title of defendant in error a trust for the benefit of plaintiff in error. Judgment in the probate

court was rendered in favor of defendant in error. An appeal was taken to the district court, and a similar judgment rendered there, and exception saved, and the cause is brought here for review.

Opinion of the court by IRWIN, *J.*:

While there are several assignments of error, only three are argued or insisted upon by plaintiff in error in his brief. First, it is alleged that as defendant in error in his complaint says that he is the owner of the premises therein described, this raises the question of title, and deprives the probate court of jurisdiction.

We do not think this position is well taken. The word owner as herein used would be merely descriptive of plaintiff's right of possession, and would not change the nature of the action. Second: It is denied that the probate court has jurisdiction in an action of forcible entry and detainer. By article 13, chapter 67, Revised Statute of 1893, justices of the peace within their respective counties are given jurisdiction in such actions.

Article 15, chapter 18, section 1562, of the same statute reads as follow-:

"Probate cou-ts in their respective counties, shall, in addition to the powers conferred upon them by the probate chapter of the Territory, have and exercise the ordinary powers and jurisdiction of justices of the peace."

And we think these two sections are a complete answer to this contention of plaintiff in error.

86 The sole and only remaining assignment of error is the third, that is, has the plaintiff below the right to bring and ma-ntain forcible entry and detainer, upon the strength of a homestead entry, when the defendant claims an interest in the land, other than possession? That is, where the defendant below claims the right to bring an action to declare plaintiff's title to be in trust for defendant. This court in the case of McLaughlin *vs.* Fariss, reported in the 7th Oklahoma, page 6, say:

"Where a homestead entryman has complied with all of the requirements of the Federal statutes, applicable to the disposal of the tract of land occupied by him, and has made final proof, paid the amount of money required, and received final certificate therefor, he has a complete equitable title to said land."

In case of Kansas Pacific Railway Company *vs.* McBratney, 12 Kans. 17, Justice Brewer, speaking for the court, says:

"In an action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition that he has a legal or equitable estate therein, and is entitled to the possession."

In a case very similar to the case at bar, the case of Laughlin *vs.* Fariss, above cited, which was one where the contest had been finally decided by the Department of the Interior, in favor of the plaintiff, and he had completed his entry, and the defendant sought to hold possession by virtue of a second contest, this court held that forcible detainer was the proper action. The only remaining question is, Can the question of a resulting trust be set up as a defense and tried in this action? Such an answer sets up title in the defend-

ant, and in fact asks the trial court to reverse the decision of the Department of the Interior, and declare the title and ownership to be in the defendant. The right to adjudicate such equitable rights in an action of this kind has been denied by this court, in the case of McDonald *vs.* Stiles, 7th Oklahoma, page 328, which was an action begun as unlawful entry and forcible detainer, before a justice of the peace. The defendant in the justice court filed answer, denying the allegation of unlawful entry, and of plaintiff's right to possession, and also set up equitable title in himself, and that the plaintiff held the real estate in question in trust for him, thus making it in
87 principle a case precisely like the one at bar. And in that case this court, through its chief justice, uses the following language:

"We are satisfied that it was never the intention of the legislature that any question other than that of the right to possession should be tried in this class of cases. It was the purpose to provide a speedy and inexpensive mode of restoring possession of real estate to the one rightfully entitled to the same. By putting title in issue, and certifying the case to the district court, all the purposes and ends to be attained by this form of remedy, and the evils to be corrected, are defeated, and the action becomes one to try legal and equitable titles, and delays the determination of possessory rights. Upon neither sound reason nor principle can the practice be sustained of converting a possessory action into one of ejectment, or one in equity to declare a resulting trust and decree conveyances of legal titles. There are appropriate forms of action, and proper forms provided for the trial of all this class of cases, and the ends of justice will be much better subserved if the remedy intended to be provided for the unlawful withholding of possession of real estate is confined to the purposes for which it was originally designed."

This court in the case of Kirtley *vs.* Dykes, 10 Okla., 18 says:

* * * "When the matter was finally decided by the Land Department, and a judgment rendered in favor of the plaintiff. Her right to the possession of the premises was completed." Armour Packing Co., *vs.* Howe, 64, Pac. 43; Widman *vs.* Taylor, 65 Pac. 615.

The entire theory of this action is that it is purely possessory. That it deals with the possessory rights and not the ultimate rights of the parties. Questions other than the immediate rights of the parties cannot be litigated in such action. If the party desires to have an adjudication of her right to a resulting trust in the land, she must resort to another forum, and another form of action.

Having examined the entire record, and finding no error therein, and believing that substantial justice has been done, the decision of the district court is affirmed, at the cost of the plaintiff in error, all the justices concurring, except Justice Hainer, who having presided in the court below, took no part in this action, and Justice Pancoast being counsel in the court below, not sitting.

88 And thereafter, to wit: June 19, 1902, at said June, 1902, term, plaintiff in error presented her petition for writ of error,

together with assignments of error, which said petition and assignment read in words and figures as follows, to wit:

89 *Assignment of Error in the Supreme Court of the United States.*

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error.

Of December term, in the year of our Lord nineteen hundred and two.

Afterwards, to wit, on the first Monday in December in this same term before the justice- of the Supreme Court of the United States at the Capital in the city of Washington, comes the said Ida McClung by John W. Shartel and S. H. Harris, her attorneys, and say that in the record and proceedings in the cause aforesaid there is manifest error in this to wit:

First. That the supreme court of the Territory of Oklahoma erred as a matter of law in holding and deciding that the probate judge for Kay county, Oklahoma Territory, had jurisdiction to entertain and try the said action as an action of forcible entry and detainer as begun in said court.

Second. That the said supreme court of the Territory of Oklahoma erred in holding and deciding that the title and ownership of land was not involved or drawn in question in said cause by the pleadings and evidence therein.

Third. That the said supreme court of the Territory of Oklahoma erred in holding and deciding that the allegations of title in the bill of particulars of the plaintiff in the said forcible entry and detainer action were but an incident to the right of possession when such allegations were denied and put in issue by the answer of the defendant.

90 Fourth. That said supreme court erred in rendering judgment for the defendant in error and affirming the judgment of the trial court instead of rendering judgment for plaintiff in error and reversing the judgment of the said trial court.

Fifth. That the said supreme court erred in ignoring and refusing and neglecting to pass upon and determine the question as to the validity as well as the force and effect of the homestead entry relied upon by defendant in error in the trial of said cause.

Sixth. That the said supreme court of the Territory of Oklahoma erred in not holding and deciding that the defendant in error was disqualified to enter and acquire title to the land in question by reason of the fact that he had entered upon the lands embraced within the Cherokee Outlet in violation of the act of Congress and proclamation of the President opening the same to settlement.

Seventh. That the said supreme court erred in not holding and deciding that the said homestead entry could be considered valid and of any force and effect for the purposes only of complying with the laws of the United States and acquiring title to said land, and tha

when said entry was relied upon as a basis of a right to oust plaintiff in error of possession which she had acquired pursuant to the laws of the United States and by reason of a compliance therewith that the court was then required to investigate and inquire into the violation as well as to the force and effect of said homestead entry for the purpose for which it was sought to be used in said cause.

Eight-. That the said supreme court erred in not holding and deciding that plaintiff in error had a right by reason of her compliance with the laws of the United States to remain in the possession of said land for the purpose of protecting her rights, until
91 patent had issued and an action could be commenced for the purpose of acquiring the legal title to said land.

Ninth. That the judgment of the said supreme court of the Territory of Oklahoma was given for the defendant in error when it should have been given for the plaintiff in error.

Tenth. That the value of the land and the matter in controversy in said action exceeds five thousand dollars ($5,000.00) as appears by affidavits presented in the record of said cause.

Wherefore, the plaintiff in error prays that the judgment aforesaid may be reversed, annulled and altogether held for nothing and that she may be restored to all things which she has lost by occasion of said judgment and that the errors of the said supreme court of the Territory of Oklahoma be fully corrected.

JOHN W. SHARTEL AND
S. H. HARRIS,
Attorneys for Plaintiff in Error.

Filed Jun- 19 1902

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

92 And on the same day, to wit, June 19, 1902, said plaintiff in error submits with her application for writ of error and assignments of error, affidavits as to the amount involved in this controversy, which affidavits read in words and figures as follows, to wit:

93 In the Supreme Court of the United States.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Affidavit.

UNITED STATES OF AMERICA,
Territory of Oklahoma, County of Logan, } *ss:*

S. H. Harris being first duly sworn says that he is acquainted with the premises involved in the above action and that he knows of the controversy between the parties therein; that said action involves the possession and ownership of the lands in said cause described, and that the matter in controversy between the parties in

said action, exclusive of costs, exceeds the sum of $6,000.00; that said value consists of the right of possession and power to relinquish to the Government of the United States the homestead entry upon said land and the said relinquishment can and would be readily sold for the sum of $6,000.00 or more if the plaintiff in error should be removed from said premises.

S. H. HARRIS.

Subscribed and sworn to before me this 19th day of June A. D. 1902.

BENJ. F. HEGLER,
Clerk of the Supreme Court,
[SEAL.] By JESSIE PARDOE, *Deputy.*

Filed: June 19, 1902.
BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

94 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Affidavit.

UNITED STATES OF AMERICA,
Territory of Oklahoma, } *ss:*

B. O. Finley, being first duly sworn, says, that he is acquainted with the premises involved in the above action, being the southwest quarter of section thirty, township twenty-six, north, range one, east, I. M. in Kay county, Oklahoma Territory, and with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of the land in question, as well as the said described tract; that the relinquishment of the defendant in error, William A. Penny, to said land in case the plaintiff in error could be removed therefrom, would be worth, and could readily be sold for the sum of eight thousand dollars, or more; that the amount in controversy between the parties in said action, exclusive of costs, exceeds $5,000.

B. O. FINLEY.

Subscribed and sworn to before me this 23 day of June, 1902.

E. J. DICK,
Notary Public.

My commission expires Feb'y 20", 1906.

[SEAL.]

Endorsed: 1085, McClung *vs.* Penny—Affidavit—Filed July 2, 1902. Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

95 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Affidavit.

UNITED STATES OF AMERICA,
Territory of Oklahoma, } ss:

R. L. Winebrenner, being first duly sworn, says, that he is acquainted with the premises involved in the above action, being the southwest quarter of section thirty, township twenty-six, north, range one, east, I. M. in Kay county, Oklahoma Territory, and with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of the land in question, as well as the said described tract; that the relinquishment of the defendant in error, William A. Penny, to said land in case the plaintiff in error could be removed therefrom, would be worth, and could readily be sold for the sum of eight thousand five hundred dollars, or more; that the amount in controversy between the parties in said action, exclusive of costs, exceeds $5,000.

R. L. WINEBRENNER.

Subscribed and sworn to before me this 24 day of June, 1902.

E. J. DICK,
Notary Public.

My commission expires Feb'y 20", 1906.

[SEAL.]

Endorsed: 1085—McClung vs. Penny—Affidavit—Filed July 2, 1902. Benj. F. Hegler, clerk supreme court. By Jessie Pardoe, deputy.

96 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Affidavit.

UNITED STATES OF AMERICA,
Territory of Oklahoma, } ss:

P. P. Bridges, being first duly sworn, says, that he is acquainted with the premises involved in the above action, being the southweat quarter of section thirty, township twenty-six, north, range one, east, I. M. in Kay county, Oklahoma Territory, and with the nature of the controversy involved in said suit.

That he is familiar with the value of lands in the vicinity of the land in question, as well as the said described tract; that the relinquishment of the defendant in error, William A. Penny, to said land in case the plaintiff in error could be removed therefrom, would be worth, and could readily be sold for the sum of eight thousand

dollars or more; that the amount in controversy between the parties in said action, exclusive of costs, exceeds $5 000.

P. P. BRIDGES.

Subscribed and sworn to before me this 25 day of June, 1902.

E. J. DICK.

My commission expires Feb'y 20" 1906.

[SEAL.]

Endorsed: 1085—McClung *vs.* Penny—Affidavit—Filed July 2, 1902. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

97 And on the same day, to wit, June 19, 1902, an order allowing said writ of error was made, a copy of which reads in words and figures as follows, to wit:

98 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Order.

Now, upon this 19th day of June A. D. 1902, comes the plaintiff in error by her attorneys, S. H. Harris and John W. Shartel, and files herein, and presents to the court, her petition and assignment of errors, praying for an allowance of a writ of error, and that a transcript of the record and proceedings duly authenticated may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises. Upon proper consideration whereof, the plaintiff does allow the writ of error, and directs and commands the clerk of this court to transmit to the said Supreme Court of the United States, a true, correct and certified transcript of the record and proceedings herein.

It is further ordered, that the plaintiff in error shall give bond for the payment of all costs that may accrue in said proceedings in the sum of three hundred ($300.00) dollars, or in lieu of such bond, shall deposit with the clerk of the United States Supreme Court, such sum as may be required by said clerk as security for all costs that may accrue in said action, and shall pay all costs in this court, subject to the final order of the court taxing costs herein.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of Oklahoma Territory.

Attest: BENJ. F. HEGLER,
[SEAL.] *Clerk Supreme Court, O. T.*

Filed: June 19, 1902.

BENJ. F. HEGLER,
Clerk Supreme Court.

99 And on the same day, to wit, June 19, 1902, a writ of error was issued in this cause, which reads in words and figures as follows, to wit:

100 In the Supreme Court of the United States of America.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error.
} Writ of Error to the Supreme Court of the Territory of Oklahoma.

UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable supreme court of the Territory of Oklahoma, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said court before you in which the value of the land and the matter in controversy exceeds five thousand dollars ($5,000.00) and wherein it appears that the value of the land is involved in the right of possession brought in question in said cause, a manifest error hath happened to the great damage of the said Ida McClung as by her complaint and assignment of errors appears, we being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States with this writ, so that you have the same at Washington on the eighteenth day of July, next, in the said Supreme Court to be then and there held that the record and proceedings aforesaid being inspected the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States and of said Territory should be done.

It is further ordered and commanded that mandate and execution upon the said judgment of the supreme court of the Territory of Oklahoma be stayed until the final determination of this
101 cause on condition that the said plaintiff in error enter into a good and sufficient undertaking to the defendant in error in the sum of twelve hundred dollars conditioned as required by law, within twenty days.

Witness, the Honorable John H. Burford, chief justice of the supreme court of the Territory of Oklahoma, this eighteenth day of June, in the year of our Lord nineteen hundred and two.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Allowed by
JNO. H. BURFORD,
Chief Justice of the Supreme Court of Oklahoma Territory.

Filed Jul- 16 1902

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

102 And afterward to wit, July 2, 1902, plaintiff in error filed her bond in this cause, which copy of said bond reads in words and figures as follows, to wit:

103 In the Supreme Court of the Territory of Oklahoma.

IDA MCCLUNG, Plaintiff in Error,
vs.
WILLIAM A. PENNY, Defendant in Error. } Bond on Appeal.

Know all men by these presents, that we, Ida McClung, (now Ida Bridges), as principal, and B. O. Finley, R. L. Winebrenner and P. P. Bridges, as sureties, are held and firmly bound unto William A. Penny in the full and just sum of twelve hundred ($1200) dollars to be paid to the said William A. Penny his certain attorney, administrator, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 20th day of June, A. D. 1902.

Whereas, lately, at a term of the supreme court of the Territory of Oklahoma, in a suit pending in said court, wherein Ida McClung is plaintiff in error, and William A. Penny is defendant, in error, judgment was rendered in said court on the 5th day of June, A. D. 1902 in favor of said defendant in error, and against the said plaintiff in error, and the said plaintiff in error having obtained a writ of error from the Supreme Court of the United States for the reversal of said judgment, and an order of the said supreme court of the Territory of Oklahoma staying the mandate, and execution of said judgment upon the giving by plaintiff in error, of a good and sufficient bond in the said sum of twelve hundred ($1200) dollars, and citation having been issued upon the said writ of error, and served upon Charles W. Ransom, attorney for defendant in error, citing and admonishing the said defendant in error, to be, and appear, at a Supreme Court of the United States to be holden at Washington the first Monday of December next.

Now, the condition of the above obligation is such, that if the said Ida McClung, (now Ida Bridges), shall prosecute her said writ of error to effect, and answer all damages and costs if she fail
104 to make her plea good, then the obligation to be void; else to remain in full force and virtue.

Witness our hands this 20th day of June, A. D. 1902.

IDA McCLUNG (NOW BRIDGES).
B. O. FINLEY.
R. L. WINEBRENNER.
P. P. BRIDGES.

Approved the within bond and the sureties thereto this July 7, 1902.

[SEAL.]

BENJ. F. HEGLER,
Clerk Supreme Court, O. T.

105 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

B. O. Finley being sworn deposes and says: that he is worth the said sum of five hundred dollars, over and above all just debts, liabilities, and exemptions.

B. O. FINLEY.

Subscribed and sworn to before me this 23rd day of June, 1902.
[SEAL.] E. J. DICK,
Notary Public.

My commission expires on the 20th day of Feb'y, 1906.

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

R. L. Winebrenner, being duly sworn, deposes and says: that he is worth the said sum of five hundred dollars, over and above all just debts, liabilities, and exemptions.

R. L. WINEBRENNER.

Subscribed and sworn to before me this 24th day of June, 1902.
[SEAL.] E. J. DICK,
Notary Public.

My commission expires on the 20 day of Feb'y, 1906.

UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

P. P. Bridge, being first duly sworn, deposes and says that he is worth the said sum of one thousand dollars, over and above all just debts, liabilities and exemptions.

P. P. BRIDGES.

Subscribed and sworn to before me this 25 day of June, 1902.
[SEAL.] E. J. DICK,
Notary Public.

My commission expires on the 20 day of Feb'y, 1906.

Endorsed: 1085—McClung *v.* Penny—Appeal bond—Filed July 2, 1902. Benj. F. Hegler, cl'k sup. ct.

106 UNITED STATES OF AMERICA, } ss:
Territory of Oklahoma, }

I, Benjamin F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 105 pages numbered from one to 105 consecutively contain a full, true and complete copy of all the papers, records and proceedings in the above-entitled cause filed in the supreme court of the Territory of Oklahoma as the same remain on file and of record in my office,

and that the same includes the original assignment of errors, the writ of error, the citation and proof of service thereof.

In witness whereof, I hereunto set my hand and affix the seal of said court at Guthrie, this 7th day of July, A. D. 1902.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk Supreme Court, Oklahoma Territory.

107 [Endorsed:] Ida McClung, (now Bridges) appellant, *vs.* William A. Penny, appellee. Appeal from Oklahoma Territory.

Endorsed on cover: File No. 18,612. Oklahoma Territory, supreme court. Term No. 384. Ida McClung, plaintiff in error, *vs.* William A. Penny. Filed July 21st, 1902.

IN THE SUPREME COURT OF THE UNITED STATES.

IDA McCLUNG,
Plaintiff in Error.
vs.
WILLIAM A. PENNY,
Defendant in Error.

No. 384.

STATEMENT OF FACTS.

On May 14th, 1900, William A. Penny, commenced an action in the Probate Court of Kay County, Territory of Oklahoma which was, by him, termed "Complaint in Forcible Entry and Detainer," to recover of Ida McClung the possession of the south west quarter of section thirty in township twenty-six, north of range one, east of the Indian Meridian, in said county and territory. Plaintiff in the action, alleges that he was the owner and entitled to the possession of the said premises. After several orders and rulings in the case, not material at this time, plaintiff in error, the said Ida McClung, on the 26th day of May, 1900, filed her answer and plea of title in said cause, which answer and exhibits thereto present all the facts involved in the motion to dismiss the proceedings in this court, as well as the consideration of the case upon the merits.

After a general denial of the allegation of the complaint, which include a denial of the plea of title in the plaintiff in

that action, plaintiff in error, the said Ida McClung, sets out that the title to the land is in dispute between the parties and that the court has no jurisdiction to try the same as an action of forcible entry and detainer. The facts as set forth, and which are conclusively established by the decisions of the Land Department attached to the said answer, show that Ida McClung is the widow and heir at law of Charles R. McClung, who, being duly qualified under the laws of the United States to take, hold and acquire title to land in the Cherokee Outlet under the Homestead Laws, made the race from the outer boundary of the said outlet to the land in question and immediately settled upon the same, claiming it as a homestead and remained upon said land, cultivating and improving the same as his homestead, until his death on the 19th of November, 1898, and since his death plaintiff in error, Ida McClung, his widow, continued to reside upon, cultivate and improve the land as a homestead under her claims of ownership therein by virtue of the homestead laws.

Perry Birdsell was the first to file homestead entry upon the land. His entry was contested by McClung and afterwards by Penny, the defendant in error herein. On March 28th, 1894, Birdsell's entry was cancelled by relinquishment and Charles R. McClung made entry of the land. The contest proceedings thereafter was continued by Penny against the homestead entry of McClung and was carried through all the various departments and proceedings of the land department of the United States, and finally resulted in the cancellation of McClung's entry and the allowance of the homestead entry upon the land by Penny.

It appears from the answer and finding of facts by the department that at the hour of opening the Cherokee Outlet to settlement at twelve o'clock, noon, of September 16th, 1893, William A. Penny was within the outer boundary of the country known as the Cherokee Outlet and on or near the east bank of the Arkansas river, and on the western border of the Osage Indian Reservation in said Outlet, and from that point entered upon the race for the land in question, and by reason of his closer proximity and on account of his presence within the outer boundary of the Cherokee Outlet, he reached the land in advance of McClung. The facts lied upon by McClung being established by the findings of the land department, the cause presents but a single question of law, if the action was one in which the question of title could be determined. The only controversy that has ever existed between the parties or that exists in the present case is as to which of the parties actually owns the land or has the paramount interest therein under the law.

Attorneys for defendant in error contend that it is not necessary to decide this question in order to determine who was entitled to the possession of the property, and they claim that they avoid the necessity of meeting this controversy by beginning the action before a justice of the peace and calling it an action of forcible entry and detainer, at the same time admitting that if the action was pending or had been commenced before the district court upon the same state of facts, the question of title would be the matter to be determined, and in their contention they appear to be sustained by the decisions of the Supreme Court of the Territory of Oklahoma. On the other hand, plaintiff in error contends that the in-

herent nature of the controversy between the parties necessarily determines the jurisdiction of the court in which the action can be maintained to settle that controversy, as well as the scope and effect of the judgment when rendered.

Plaintiff in error, upon the answer filed and facts disclosed in the Probate Court, claims that she was entitled to have the cause transferred to the District Court by certificate of the Probate Judge to the effect that the title to real estate was involved and that the Probate Court had no jurisdiction to determine the controvehsy, it being conceded that the Probate Court has the same jurisdiction as a justice of the peace, and this relief being refused the plaintiff in error moved in the District Court, for a dismissal of the action for want of jurisdiction.

If the title to the land in controversy is in dispute between the parties and is necessarily involved in any action commenced by one party against the other, and necessarily involved and drawn in question in the present action, then this court has jurisdiction to consider the writ of error herein, because the land is admittedly worth more than five thousand dollars.

BRIEF AND ARGUMENT ON MOTION TO DISMISS.

The motion to dismiss presents the case for consideration upon the merits, if it is a proper motion to be considered at this time at all, and, as we view the law, presents the only question to be determined in this cause in this court.

Plaintiff in error contends that the title to real estate is involved and drawn in question in the controversy between the parties and that the Probate Court had no jurisdiction

to try the action. When the case was taken to the District Court on appeal the situation was the same, and the principal error complained of in the writ of error is that the Supreme Court of the Territory erroneously held and decided that the title or boundary of real estate was not involved.

The same question of jurisdiction presented to this court is the question of jurisdiction running back through the case to its inception.

It is not necessary that this court should be of the opinion, from an examination of the facts, set forth in the record, that the title claimed by the plaintiff in error is or was paramount to the title claimed by the defendant in error. It is only necessary to look far enough into the facts to see that the matter to be adjudicated is a question of title, and this court cannot properly determine how that question should be adjudicated, when properly presented, until the controversy is before the court on a judgment from a court having jurisdiction to determine that matter and permit of its being properly brought to this court.

The decision of the Supreme Court of the Territory complained of herein is not based upon the statute of the Territory and is not claimed to be a construction of any statute, but we quote the statute of the Territory, which might be considered in the determination of the motion to dismiss.

Secion 9 of the Organic Act of the Territory of Oklahoma provides that "justices of the peace, who shall be elected in such manner as the legislative assembly may provide by law, shall not have jurisdiction of any matter or controversy when the title or boundary of land may be in dispute."

Section 4805, Statutes of Oklahoma, 1893, is as follows:

"Any justice within his proper county shall have power to inquire in the manner hereinafter directed, as well against those who make unlawfully and forcibe entry into lands and tenements and detain the same as against those having a lawful and peaceable entry into lands and tenements, unlawfully and by force hold the same, and if it be found upon such inquiry that an unlawful and forcible entry has been made, and that the same lands and tenements are held by force, or that the same, after a lawful entry are held unlawfully, then said justice shall cause the party complaining to have restitution thereof."

And Section 4806—

"Proceedings under this article may be had in all cases against tenants holding over their term, in sales of real estate on execution orders or other judicial process, when the judgment debtor was in possession at the time of the rendition of the judgment or decree, by virtue of which such sale was made; in sales by executors, administrators, guardians and on partition, where any of the parties to the partition were in possession at the commencement of the suit, after such sale so made on execution or otherwise shall have been examined by the proper court and the same, by said court, adjudged legal; and in cases where the defendant is a settler or occupier of lands and tenements, without color of title and to which the complainant has the right to possession. This section is not to be construed as limiting the provisions of the first section."

Section 4645 is as follows:

"If in any action commenced before a justice it appears to the satisfaction of the justice that the title or boundary of land is in dispute in such action, such action shall be stayed before said justice, and said justice shall, within ten days thereafter, certify said case and transmit all papers and process therein to the clerk of the district court of his county and said case shall be docketed and thereafter proceeded with in the district court as if originally commenced therein; the justice before whom said action is commenced shall require of the defendant setting up said title or boundary, to set forth in his answer or bill of particulars a full and specific statement of the facts, constituting his defense of said title or

boundary brought in question; and the defendant shall be required to make affidavit of the truthfulness of the statements in his said answer or bill of particulars contained, and that said defense is *bona fide*, and not made for vexation or delay but for the promotion of justice."

Subdivision five of Section 4646 provided that:

"Justices shall not have cognizance in any action in which title to real estate is sought to be recovered or may be drawn in question."

The difference between the contention of counsel for defendant in error, based upon the decisions of the Supreme Court of Oklahoma Territory, and counsel for the plaintiff in error, consists in the assertion on their part that the nature and scope of the action is determined to be one of forcible entry and detainer because the plaintiff elected to commence the action in that form, rather than go into a court of general jurisdiction, where the alleged foundation of his rights could be investigated and determined; while the plaintiff in error contends that the inherent nature of the controversy determined the court in which the action must be commenced, and the scope of the remedy.

Under the decisions of the Oklahoma Supreme Court it is impossible to raise any question and have the cause transferred to the District Court, when the plaintiff asserts that the action is one of forcible entry and detainer, although, if the same action had been commenced in the District Court, no question would be presented for determination except the question of title.

We would not be disposed to so broadly admit the application of the decisions cited by counsel for defendant in error, in his motion to dismiss, if it were not for the fact that the Supreme Court of the Territory has recently placed its own

construction upon its former decisions, in language absolutely unmistakable, in the case of *Yingling vs. Redwine*, 69 Pac. 810.

As the decision just cited has not been published in any volume and is found only in the advance sheets of the West Publishing Company, Pacific Reporter No. 10, August 18th, 1902, we copy the opinion in full:

YINGLING v. REDWINE.

(Supreme Court of Oklahoma, July 18th, 1902.)

MORTGAGE—What Constitutes—Recording—Foreclosure—Parol Evidence—Possession—Cross Examination—Demurrer to Evidence.

1. Every instrument purporting to be an absolute conveyance of real estate or any interest therein, but intended as security for the payment of money, shall be deemed a mortgage, and must be recorded and foreclosed as such.

2. Parol evidence is admissible to show that an instrument purporting to be a warranty deed was in fact executed as security for the payment of money.

3. When a deed absolute on its face is shown to be a mortgage in fact, the rights of the parties to such instrument will be measured and determined by the laws governing the rights of parties under a mortgage.

4. In the absence of a specific agreement to the contrary, a mortgagee is not entitled to the possession, as against the mortgagor, although the mortgage purports on its face to be a deed absolute.

5. The latitude allowed on cross examination of witnesses is largely within the discretion of the trial court, and unless such discretion has been abused to the manifest injury of the complaining party, a cause will not be reversed for such errors.

6. The trial court should sustain a demurrer to the evidence whenever all the evidence, and the reasonable and rational inferences and deductions therefrom in favor of the plaintiff, taken as true, will not warrant a verdict for the plaintiff.

Syllabus by the court.

Error to the District Court of Pawnee County; before Justice Bayard T. Hainer.

Action by F. D. Yingling vs. W. H. Redwine. Judgment for defendant and plaintiff brings error. Affirmed.

C. J. Wrightsman and *E. M. Clarke*, for plaintiff in error.

A. J. Biddison, for defendant in error.

BURFORD, C. J.: The plaintiff in error, F. D. Yingling, brought this action in the Probate Court against the defendant in error, W. H. Redwine, for forcible detainer and to recover possession of lots one to eight inclusive, in block thirty-five in the town of Pawnee, Oklahoma. Yingling recovered judgment in the Probate Court and Redwine appealed to the District Court, trial was there had to a jury and after the plaintiff had introduced his evidence and rested the defendant demurred to the evidence. The court sustained the demurrer, discharged the jury and gave judgment against the plaintiff for costs. From this judgment the plaintiff, Yingling, appeals to this court and complains of the ruling of the trial court in sustaining the demurrer to the evidence and discharging the jury.

In October, 1898, the defendant Redwine was the owner of the real estate in question and on October 25th, 1898, conveyed the same by warranty deed to F. D. Yingling. On October 31st, 1898, by a written instrument duly executed, Yingling leased to Redwine the real estate in question, at an annual rental of $52.50, and agreed to reconvey to Redwine the real estate, at any time within the five years, on payment to him of the sum of seven hundred dollars. Redwine remained in possession of the property, and, on December 19th, entered upon the margin of the record where said lease was recorded, in the office of the register of deeds, a written release of all rights, options and privileges under said lease. On the trial of the cause the plaintiff relied upon his deed and the release

above referred to, together with proof of service of a notice to quit. The court, on cross-examination of plaintiff's witnesses, permitted the defendant to show that, at the time the deed and lease were respectively executed, Redwine was indebtd to Yingling in a considrable sum; that the deed was executed as security for the payment of a portion of said sum; and that it was agreed between the parties that Yingling would re-convey the real estate to Redwine at any time he should pay on said indebtedness, a sum equal to the agreed value of the real estate.

By Section 12, c. 8, Sess. Laws, 1897, it is provided:

"Every instrument purporting to give absolute or qualified conveyance of real estate or interest therein, but intended to be defeasible or as security for the payment of money, shall be deemed a mortgage and must be recorded and foreclosed as such."

Parol evidence is admissible to show that a conveyance of real estate, absolute on its face, was given as security for the payment of money, and when such proof is made, it is the duty of a court to treat such instrument as a mortgage, and determine the rights of the parties thereto as under a mortgage. The evidence in this case clearly established the fact that Redwine executed the deed to Yingling and conveyed to him the real estate as security for the payment of an indebtedness previously incurred. The lease from Yingling to Redwine was for the purpose of carrying out the plan by which Yingling was to hold the real estate as security; Redwine was to pay a rental equal to the interest on the debt and on payment of the principal Yingling was to re-convey to Redwine.

It is contended by the plaintiff in error that Redwine released his interest and rights in and under the lease and that the right of possession then reverted to Yingling. This contention would be well founded had Yingling taken an absolute title under his deed; but such was not the case, he in fact only had a mortgage on the real estate, and in the absence of a specific agreement to the contrary, a mortgagee is not ordinarily entitled to possession until after foreclosure and sale. His rights were to be measured and determined by the rights of a mortgagee and when at his request, as was shown by the evidence in this case, the lease to Redwine was, by mutual agreement, cancelled and released, Redwine was left in lawful possession of his own property.

According to plaintiff's own contention the lease executed on October 31st, 1898, was released and cancelled. Yingling testified that he paid Redwine One Hundred Dollars to induce him to cancel this lease and to execute a new one, coupled with some other conditions. It was shown that a second lease was written up and signed by the parties, by which Redwine agreed to pay rent for the real estate, and Yingling agreed to re-convey it to Redwine, on payment of One Thousand Dollars, but plaintiff denied the delivery of this lease, and introduced evidence to show that it had never been delivered. He was bound by his own testimony. If the second lease had been relied upon by plaintiff to recover for non-payment of rent, the defendant would probably have been estopped from questioning its terms; and although it, the lease, with the deed and the intention of the parties, would have together been held a mortgage, yet the right of possession would, by the terms of the agreement, have been in the

plaintiff. It is contended that the court erred in permitting the defendant to make a case on cross-examination of plaintiff's witnesses. The issue in the case was the right of possession; the plaintiff relied upon his deed and title and introduced the first lease and release of same on the margin of the record. The character of these instruments became a proper matter of inquiry, and if there was any parol agreement by the parties by which the effect was different from what was apparent on the face of the instrument we can see no serious error in permitting it to be brought out on cross-examination of the party who offers them. The question of the propriety or extent of cross-examination is one largely within the discretion of the trial court, and where there has been no abuse of such discretion, to the manifest injury of the complaining party, the cause will not be reversed.

We think there was no error in the court sustaining the demurrer when all the evidence offered by the plaintiff, with the reasonable inference and deductions therefrom, are taken as true and yet the plaintiff would not be entitled to a verdict, then the court should sustain the demurrer and discharge the jury. The evidence offered by the plaintiff showed beyond question that the deed offered in evidence was executed as security for the payment of money; that the defendant was the owner in fact; that he was in possession; that the lease by which he agreed to be a tenant of Yingling had been mutually abandoned and cancelled and that the last lease had never been executed. Under this state of facts the plaintiff was not entitled to the possession. While in this kind of an action, the title to real estate will not be tried, yet the title and the right to title as well as the character of the title of

each claimant may be inquired into sufficiently to enable the court to determine the right of possession.

The judgment of the District Court of Pawnee County is affirmed at the cost of the plaintiff in error.

All of the Justices concurring except Hainer, J., who tried the case below, not sitting, and Irwin, J., absent.

From the decision above quoted, it appears that the sole matter in controversy was the title and ownership of certain real estate in the town of Pawnee. The contention on one side being that the property was held by Yingling under a warranty deed, and that he was the absolute owner thereof, and on the other hand Rodwine contended that he was the owner of the property, and that Yingling's deed only amounted to a mortgage upon the property to secure the payment of money. If we apply to this decision the law of *res adjudicata*, as it is universally understood, at least outside of the Supreme Court of Oklahoma Territory, Yingling's deed has been determined, by this decision, to be really a mortgage. To say that the court, at the end of this expensive and tedious litigation, can determine the deed to be really a mortgage, and that another action might be immediately commenced in which the same court would be at liberty, upon the same state of facts and in a suit between the same parties, to determine the same deed to be *bona fide*, and to constitute both the legal and equitable title to the same property, and that this sort of thing could go on indefinitely, would be to countenance a course of "solemn trifling" that would hardly be consistent with a proper solemnity, when considered by any lawyer at all familiar with the principles involved.

We admit that the decisions of the Supreme Court of

Oklahoma Territory support the contention of the defendant in error, but we deny that they are in harmony with either the Organic Act, the Statutes of the Territory, sound legal principles, precedents from other courts, or common sense.

We think that *Black vs. Jackson*, 177 U. S. 349, and *Langford vs. Monteith*, 102 U. S. 145, are sufficient authority to support our contention that the title to real estate is involved in the action and that the jurisdicion of this court, on writ of error, is sustained, by reason of the fact that the land in question is worth more than five thousand dollars, as well as our contention that the judgment of the Supreme Court of the Territory of Oklahoma should be reversed and the case returned to the District Court with directions to dismiss.

See, also, *The New Orleans Pacific Railway Co. et al. vs. John D. Parker et al.*, 143 U. S. 42, 12th Supreme Court Reporter 364.

Price vs. Olds, 6 Kansas 66.

Alderman vs. Boeken, 25 Kans. 658.

Duffy vs. Rafferty, 5 Kans. 9.

Simpson vs. Boring, 16 Kans. 248.

Mooney vs. Olson, 21 Kans. 697.

Hollett vs. Ess, 31 Kans. 88.

Conway et all. vs. Gore, 27 Kans. 122.

In a later case by the Supreme Court of Kansas, cited by the Oklahoma court, in the decision complained of, the last decision referred to is given as authority for the doctrine of

the Oklahoma Supreme Court, but the decision of the Kansas court is really based upon *McDonald vs. Styles*, 7 Oklahoma 337. The difficulty with the Oklahoma decisions and the late Kansas decisions, following the Oklahoma doctrine, is that they not only ignore the general principles of law with reference to determining the nature of the action but they also nullify that part of section 4806, Statutes of Oklahoma, which provides that the action of forcible entry and detainer will lie "in cases where the defendant is a settler or occupier of lands and tenements without color of title, and to which the complainant has the right of possession."

If we suppose a case directly within this statutory provision the fallacy of the doctrine complained of is at once apparent. If the plaintiff, supposing himself entitled to the possession of real estate and to be the owner thereof, begins an action of forcible entry and detainer against one holding, as plaintiff claims, without color of title, and the defendant should set forth in his answer and proceed to establish by the proof absolute and unmistakable "*color or title*," then the action of forcible entry and detainer would not lie, for two reasons: First, because of the statute just quoted, and, Second, because justices of the peace have no jurisdiction to try an action in which the title to land is in dispute or drawn in question. In the case supposed, what would the Oklahoma Supreme Court proceed to do? They do not appear to entertain the idea that the action should be dismissed before the justice of the peace, for want of jurisdiction, and such a proceeding would be in direct violation of Section 4645, Statutes of 1893, heretofore quoted, requiring such actions to be certified to the District Court where the question of title could be

properly disposed of; but they say that, if the action is branded as one of forcible entry and detainer, and commenced before a justice of the peace, it must then and forever remain an action of forcible entry and detainer, without regard to fundamental law, statutory provisions or the inherent nature of the controversy presented for adjudication.

We might also illustrate the error of the court by supposing an action of forcible entry and detainer commenced against the occupier of premises under an executed oral contract of sale, and delivery of possession, by the holder of a subsequent deed from the same grantor. Or an action commenced against the owner and occupier of premises by the holder of a tax deed alleged to be void for want of compliance with laws in relation to the issuance thereof.

Color of title does not mean good title, and the plaintiff in error in this case sets forth in his answer and establishes in the proof an unbroken chain of title to the land in question, with the exception of the alleged unlawful action of the Secretary in cancelling his homestead entry. If that entry was unlawfully cancelled it remained, in contemplation of law, valid and binding, because the decision of the Secretary upon a question of law, is not binding upon the courts, and in a proper proceeding, courts will protect the interest of parties against wrong sought to be imposed by virtue of such unlawful action on the part of the Secretary and his mistaken application of the law.

Black vs. Jackson, supra, and cases cited.

Alderman vs. Boeken, 25 Kans. 658.

In the last case the court says:

"If he, the defendant, has color of title in equity we think that is sufficient to defeat the action. Color of title in equity, without an absolute title, we think is sufficient to defeat the action; besides actions of forcible entry and detainer or forcible detainer are not to be encouraged against persons who have long been in possession of real estate, supposing that they had some kind of interest therein and who had made improvements thereon, whatever the rights or interests of such persons may be."

We are not aware that the case just quoted from has ever been overruled or even modified, and it appears to us to be in accord with sound legal principles and common justice, and the facts and law of the entire case are peculiarly applicable to the case at bar.

See, also, *Murray vs. Burris*, 42 Northwestern Reporter 25.

The case of *Langford vs. Monteith, supra*, was a writ of error to the Supreme Court of the Territory of Idaho, and the questions involved were, in principle, precisely like the present case. The language of the statute, as to the limitations upon the jurisdiction of the justice of the peace, is even more restrictive than the statute of this territory. Under the statute the jurisdiction of the justice of the peace ceases when it appears that the determination of the action "will necessarily involve the decision of a question of title," while with us it is only required that the title to land is involved or drawn in question. The case was in forcible entry and detainer, like the present, and we see no distinction in principle between the two cases. This decision of the Supreme Court of the United States has been cited in the briefs and discussed in the oral argument of the case at bar and a large number of other cases

of the same kind recently decided in the Oklahoma Supreme Court, but has never yet been referred to by the court, in any manner whatever.

The Supreme Court of the Territory mistakenly asserts that we ask the court to reverse the decision of the Department of the Interior and declare the title and ownership to be in plaintiff in error. We have made no such assertions in this case, and do not wish to be responsible for such a position We understand very well that the court cannot reverse the decisions of the Department of the Interior until after the legal title to the land has passed from the government. We think that the defendant in error is entitled under his homestead entry to possession of sufficient to enable him to make the necessary improvements and maintain a residence upon the land, in order to be entitled, if he so desires, to a patent for the land.

These rights are all that are guaranteed to him by the homestead laws of the United States, and for such purpose, the homestead entry is conclusive upon the courts, until after the legal title is vested in the entryman; but it does not follow that because the homestead entry is good for some things that it is good for everything. When the holder of the entry, which has been allowed in violation of law and without legal authority on the part of the Secretary, goes into court to recover something not granted to him by the homestead laws and not necessarily resulting from his homestead entry, he must necessarily submit his claims to investigation, the same as any other litigant, and such was the determination of this court in the case of *Black vs. Jackson*, where the same questions were presented, with the exception that the action was con-

menced in the District Court and the plaintiff in the action had unlawfully entered from a different prohibited district. That case decides, as we understand it, First, That the title to the land for the possession of which the action was brought, was in dispute, and for that reason this court had jurisdiction to consider the appeal, since the land was worth more than five thousand dollars.

Second, That the demurrer to the answer was improperly sustained, and that the defendant had a right to present his defense to a jury. Third, That it could not be presumed that plaintiff, who had only a homestead entry, would comply with all the provisions of the law and finally acquire the legal title to the land. Fourth, That the defendant had color of title and a vested interest in the property, including the right of possession, by virtue of his compliance with the laws of the United States; and that such facts might be made to appear upon the trial of the case. Fifth, That the action was triable in the District Court upon the issues as framed. Sixth, That the plaintiff might bring his action in forcible entry and detainer and recover possession of that portion held by the defendant, Black, UNLESS IT APPEARED THAT THE OFFICERS OF THE LAND DEPARTMENT ERRED AS A MATTER OF LAW, in deciding in favor of Jackson.

Of course this court can not presume that the defendant in that case could prove the facts set forth in his answer, but unless those facts CONSTITUTED A DEFENSE TO THE CLAIM OF THE PLAINTIFF, if established upon the trial, there was nothing to try, either to the court or a jury, and the ruling of the lower court, sustaining the demurrer, would

necessarily have been sustained, unless this court consider that the answer stated a good defense upon its face.

We do not apprehend that this court will determine the qualifications of the defendant in error or the effect that his entry upon the land from an Indian reservation would have upon the homestead entry, if that question had been decided by the Supreme Court of the Territory and was here presented for determination and review, because these questions as to who has the better title to the land can not be decided in a forcible entry and detainer case, as we view the law, and the Supreme Court of the Territory did not pretend to dispose of the question in this case. We contend, however, that such is the question necessarily presented for determination on account of the inherent nature of the controversy between the parties, and that such being the case the title to the land is involved and should be determined in the proper form of action, and is the only matter in controversy necessary for determination. For these reasons we think the judgment of the Supreme Court of the Territory should be reversed and the plaintiff in the court below compelled to present the case to court having jurisdiction to determine the whole controversy between the parties.

The defendant in error suggests in his motion that, since the beginning of the present action, defendant in error has submitted his final proof and received his duplicate receipt, and that for that reason the present proceeding in error should be dismissed. But we do not understand that this court will investigate facts in relation to the rights of the parties, subsequent to the appeal or even to the beginning of the action, unless those facts were put into record in the lower court by

supplemental plea, and that the rights of the parties relate to the beginning of the action in the lower court; but if we admit that the facts are properly presented for the consideration of this court, and even if they existed at the time of the beginning of the action in the lower court, the situation would be in no manner changed or modified.

It would still be a question and controversy as to the ownership of the land.

Defendant in error also suggests that an action in ejectment is now pending between the same parties and that all questions in relation to the title can be adjudicated in that action. The complaint in the present case contains every allegation necessary for a petition in ejectment under our system; the answer contains all the facts that could possibly be presented in such a case, and it is admitted that the same pleading upon the same facts, in a different court, would necessarily present a case for the determination of title, and at the same time defendant in error contends that these same pleadings upon the same facts, by virtue of the wisdom of the plaintiff in selecting a justice of the peace, instead of a court of competent jurisdiction to try the case, presents no question of title and that title is in no manner involved or presented for adjudication. If this is law, it is indeed strange.

The secret source of this contention is to be found in the multitude of cases that have found their way into the Supreme and inferior courts of the Territory, upon questions of this character wherein it is sought to evade the real question involved in the controversy by ousting the lawful claimants and entrymen from possession, and permitting a sale or transfer of the land, to an innocent purchaser. The parties have

sought to accomplish, indirectly, what they have dreaded to undertake by direct proceedings.

As we have before stated we do not understand that the court would be authorized to adjudicate the question as to who has the lawful claim to the land in controversy in this proceeding in error, but we submit a few suggestions upon the merits of the real controversy in order to show that our contention as to the ownership of the land is not without foundation and that it is made in good faith and for the *bona fide* purpose of protecting what we believe to be our just and lawful rights. Of course, if this court should feel disposed to adopt the dictrine of *Yingling vs. Redwine*, and try and determine the question of title and ownership in this form of action, it would be necessary to consider the merits of our claims.

SUGGESTIONS ON THE MERITS.

The qualification of intending settlers upon these lands does not necessarily have any reference whatever to the description of the actual tracts and parcels of land opened for occupancy of such settlers. The qualification of settlers is described and defined in the various acts of Congress, including the act opening the Cherokee Outlet to settlement, and the proclamation of the president issued pursuant thereto. The lands actually opened to occupancy were such as had become the absolute property of the United States, free from all Indian claims of title or right of occupancy, and such as were not reserved from public settlement. The only confusion that can possibly arise in reference to the construction of the law and proclamation is on account of confounding the qualifications of settlers with the description of lands actually

opened to occupancy. When the question of qualification is entirely separated from the other question and considered alone in the light of the plain, positive and unmistakable language of the Act and Proclamation there is no possible room for controversy in the matter. We have nothing to do with the reasonableness of one theory or the other with reference to the construction of this act and proclamation so long as the plain meaning, intent and purpose of the law is ascertainable from the reading of the law itself.

It was the intention and purpose of the Government to open to settlement all the lands lying west of the 96th degree and by the act of March 2, 1899, section 14, it is provided:

"Section 14. The president is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the 96th degree of longitude in the Indian Territory, etc."

See "Executive Document No. 78, 51st Congress, first session. Letter from the Secretary of the Interior transmitted in response to senate resolution of March 10, 1890, the compilation concerning the legal status of the Indians in Indian Territory."

All the lands lying west of the 96th degree were referred to and considered in the Act of Congress with reference to opening the same to settlement, and the proclamation of the President, and were, in all such acts, proclamations or other public papers, tretatd as the country "known as the Cherokee Outlet,' and describe by metes and bounds, and all of said country was opened to settlement except certain exceptions specified in the proclamation, which included such lands as treaties had not been completed for, as well as all public reservations, etc.

The prohibition contained in the Act of Congress is that "no person shall be permitted to occupy or enter upon any of the lands *herein referred to* except in the manner prescribed by the proclamation of the president opening the same to settlement and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands."

By reference to other sections of the act it will be seen that the entire body of land lying west of 96 was referred to and described by metes and bounds, and the proclamation of the president, although excepting certain lands from settlement and occupancy because treaties had not been completed, and for other reasons, did not grant permission to anyone to enter upon any of the lands referred to in the Act of Congress. The act made provision for opening all of the land west of 96 if treaties had been completed prior to the opening thereof. It was evidently the intention of congress to avoid controversies which arose with reference to the opening of Old Oklahoma, and which were discussed in *Smith vs. Townsend*, by clearly and definitely describing the country referred to by metes and bounds and avoiding any possible contention that persons might enter or collect upon any portion of the body of lands referred to which should not be opened for homestead settlement. The act stated, by express terms, what the former act was construed to mean, that is, that it was "the evident intent of congress by this legislation to put a wall around this *entire territory* and disqualify from the right to acquire under the homestead laws any tract within its limits every one who was not outside of that wall at the hour of opening."

The proclamation of the president described the country by metes and bounds in the same manner as the Act of Congress and in all acts and proclamations it was referred to as the "country known as the Cherokee Outlet" and with reference to the 100-foot reservation the proclamation provided that "said strip, the inner boundary of which shall be 100 feet from the exterior boundary of the country known as the Cherokee Outlet." The description given in the act and proclamation do away with the necessity of investigating all technical questions as to just what lands did or did not constitute the Cherokee Outlet proper or what was occupied or unoccupied, because the country dealt with in the act and proclamation was the same piece of country referred to in section 14 of the act of March 2, 1889, and the descriptions by metes and bounds and other designations dealt with that country wholly, and all parts thereof which were not open to homestead settlment were included in the exceptions mentioned in the Proclamation. Again the Proclamation declares that notice is especially given that no person shall be permitted to occupy or enter upon any of the lands *therein referred to.* Certainly all of the lands west of 96 were referred to in that Proclamation and were particularly described by metes and bounds, coupled with the designation of the same as the country "known as the Cherokee Outlet."

The act described the lands acquired from the Cherokees as being bounded on the north by the state of Kansas, on the west by the public land strip and the state of Texas on the south by the Territory of Oklahoma and the Cheyenne and Arapahoe Indian reservations, and *on the east by the 96th degree*, and immediately following this description "*the lands*

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referred to being commonly known and called the Cherokee Outlet."

There would seem to be a controlling affinity between the expression "the lands referred to being *commonly called the Cherokee Outlet,"* and the repetition of the same expression "any of the lands referred to," and that obviously the first use of the expression is a definition or antecedent of the second. A word or expression repeatedly used in a statute will bear the same meaning throughout the statute unless a different intention appears.

Sutherland on Statutory Construction, section 255.

Pitt vs. Shipley, 46 California 154.

County Seat of Linn County 15 Kans. 500.

The construction of these acts and proclamations contended for by persons who entered upon the lands described by metes and bounds prior to the time of opening would place in the statute by construction the provision: "*all* persons are permitted to enter upon any portion of the lands referred to in the Act of Congress and this proclamation except such portions as are actually opened to occupancy as town lots or homestead claims." We believe such a contention is absurd in the face of the language of the act and the evident intention thereof, considered in the light of the decision of the Supreme Court of the United States in *Smith vs. Townsend.*

The 100 foot reservation is as positively fixed around the entire tract of country *referred to in the act and proclamation* as though the boundary description had been repeated with every reference thereto throughout the Act or Proclamation.

It is a well known fact and one which the Court should take judicial notice of in this case under the authority of *Smith vs. Townsend*, that the Act and Proclamation were almost universally construed to mean just what they state, that is, that the entire tract of country west of 96 was referred to and that no one would be permitted to enter upon the same prior to the hour of opening and this related to the qualification of settlers only, regardless of the description of the lands opened to settlement. Such was the understanding of the Departments of the Government. Booths were established with reference to such construction. The military officers of the United States were directed to forcibly exclude all persons from any portion of the entire body of land and no one was permitted to go upon any of the excepted territory and no one did go upon it except such as were able to evade the viligence of the Troops and United States Officers and, as we believe, such as intended to make affidavit at the proper time or testify in any proceeding that they actually entered upon the land occupied as a homestead, from the outer boundary of the entire tract of country. It is certainly true that something like 150,000 people collected upon the boundaries of this country as compared with probably 25 or 30 who stole into the country in the night time despite the efforts of the soldiers to keep them out and then sneaked across the river at the hour of opening and claimed land as homesteads and confessed the manner of entry after the facts were known.

Inquiries were made of the Secretary of the Interior with reference to his construction of the act as shown in *Cagle vs. Mendenhall*, 20 L. D. 446. and such persons were advised by telegram that no one would be permitted to enter except from

the outer boundary of the entire tract of country. Such was the construction of the law for a long time after the opening and until after plaintiff in error had acquired rights in the land in question, and such contemporaneous construction should receive great weight even though the court should be of the opinion that the Act of Congress and the Proclamation do not plainly express their intent and purpose in accordance with such construction. The history of this question in the land department is somewhat peculiar. In Cagle vs. Mendenhall the act of Congress and Proclamation of the President are not discussed, but Cagle was held disqualified because he entered upon the land in violation of a telegram from the Secretary to Mendenhall. The case of Welsh vs. Butler, 21 L. D. 369 held that entry from the Chilocco School reservation was not unlawful because such reservation was not contemplated in the telegram to Mendenhall, and again the Act of Congress and Proclamation of the President are overlooked. The ruling of the Department with reference to the Indian Reservations other than the Chilocco School was reversed in Brady vs. McDonald and it was there held that the Act of Congress and Proclamation of the President fixed the qualification of settlers and that such qualifications could not be altered by telegram from the Secretary. The doctrine of Welsh vs. Butler, however, based upon the theory that that reservation was not included in the telegram, remains unshaken to this day.

In Brady vs. McDonald, the decision is based upon the assumption, without any discussion, that the country known as the Cherokee Outlet, and which was bounded on the east in the Act of Congress and Proclamation of the President,

by the 96th degree, was in fact bounded on the east by the Arkansas River.

It will be noticed that such eastern boundary was never referred to in any Act of Congress, Proclamation of the President or decision of any court, prior to this decision of the land department.

Decker vs. A. T. & S. F. R. Co. 3 Oklahoma 553.

U. S. vs. Pridgeon, 153 U. S. 48.

The act of May 2, 1898, 23 Statutes at Large 81, provides that "all the Indian Territory, except so much of the same as is actually occupied by the five civilized tribes and the Indian tribes within the Pawpaw agency and *except the unoccupied part of the Cherokee Outlet together with all that part of the United States known as the public land Strip, is hereby erected into a temporary government, etc.*"

By Section 9 of the same Act the lands west of the Arkansas River are referred to as "that portion of the *Cherokee Outlet* not embraced within the boundaries of said Territory of Oklahoma." Other instances of the specific use and definition of the expression "Cherokee Outlet" are found in the treaty of 1835, 7 Stat. 578, patent to the Cherokees of this tract, Senate Document 124, 46th Congress, second session. Opinion of Assistant Attorney General Shield, Senate document No. 57, 52 Congress page 20, and the treaty of 1828 in which the Cherokee Nation was guaranteed a "perpetual outlet west," etc.

It is clear that the "country known as the Cherokee Outlet" meant all the country lying west of 96 and between the north and south boundaries thereof. So that the "lands

herein referred to" and the 100 foot boundary "around and within the outer boundary of the entire tract of country known as the Cherokee Outlet" would be plain and unmistakeable even without the definite and postive boundary description given in the Acts of Congress and proclamation of the President. The term "the entire tract of country herein referred to" must necessarily include each and every part and parcel of all and every tract referred to in the act and proclamation. If a tract of country bounded on the east by the 96th degree is referred to in the Act and Proclamation, which it unquestionably is several different times, then the meaning of the term last quoted is unmistakable.

Jordan vs. Goldman 1st Oklahoma 427, is a case discussing the boundaries and what is understood by the "Cherokee Outlet."

Again an even and unbroken border would better serve the purpose and intention of the act and proclamation and would make it more easy of protection and from intrusion. A glance at the map showing the uneven and broken nature of the boundaries of the lands actually opened to homestead settlement is sufficient of itself to justify the interpretation of the law by the department at the time of the opening, even though the language of the act of Congress and proclamation were actually indefinite and uncertain. If these reservations on the east could be occupied because they were not opened to settlement, all the school and college reservations which happened to come in contact with the outer boundary would likewise be exempt from the prohibition and we see no reason why the reservations for public roads at every section line and public reservation in the interior accessible therefore

might not have been covered with settlers prior to the hour of opening with the same reason and justification.

So far as the ordinary law of land boundaries offers an analogy, if there were a conflict or discrepancy between the two expressions used in the Act and Proclamation, that which carries with it precise and geographical certainty, would, in all cases, be held to be controlling.

Smith vs. Strong, 14 Pick. 128.

Whiting vs. Dewey, 5 Pick. (Mass.) 428.

Dana vs. Middlesex Bank, 10 Metc. (Mass.) 250.

Howell vs. Saul, 5 Monroe, 410.

Barney vs. Miller, 18 Ia. 466.

Jones vs. Smith, 73 N. Y. 205.

Gans. vs. Aldridge, 27 Ind. 294.

McEowen vs. Lewis, 26 N. J. L. 451.

Holmes vs. Trout, 7 Pet. 121.

Crogan vs. Nelson, 44 U. S. 187.

Ship vs. Miller's Heirs, 2 Wheat, 316, 29 Pac. 491.

Even a general description where definite and certain will control a special description where indefinite and uncertain.

Martin vs. Lloyd, 94 Cal. 195.

Herrick vs. Hopkins, 23 Me. 217.

Sawyer vs. Kendall, 10 Cush. (Mass.) 241.

West vs. Bretell, 115 Mo. 653.

Respectfully submitted,

S. H. HARRIS,

Attorney for Plaintiff in error.

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In the Supreme Court of the United States

IDA McCLURG, PLAINTIFF IN ERROR,
vs.
WILLIAM A. PERRY, DEFENDANT IN ERROR.
No. 284.

OCTOBER TERM, 1902.

ERROR TO THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

SUPPLEMENTAL BRIEF

OF PLAINTIFF IN ERROR ON MOTION TO DISMISS AND ON THE MERITS OF THE CASE.

S. H. HARRIS,
For Plaintiff in Error.
J. J. DARLINGTON,
Of Counsel.

In the Supreme Court of the United States

IDA MCCLUNG, PLAINTIFF IN ERROR,
vs.
WILLIAM A. PENNY, DEFENDANT IN ERROR
} No. 384.

OCTOBER TERM, 1902.

Statement of Facts.

After brief in this case was forwarded to the clerk of the Court by the printer, it was discovered that the same did not comply with Rule 31, and with the opinion of this Court in Railroad Company *vs.* Jacobson, 179 U. S. 294, and for that reason counsel for plaintiff in error request that this brief be considered in lieu thereof.

On May 14, 1900, the defendant in error, William A. Penny, commenced an action in the Probate Court of Kay County, Oklahoma Territory, which was by him termed a "complaint in forcible entry and detainer," to recover of Ida McClung the possession of the southwest quarter of Section 30, Township 26 north, Range 1 east of the Indian Meridian, in said county and Territory. The plaintiff in

that action, defendant in error, alleged that he was the owner and entitled to the immediate possession of the premises. After several rulings and orders in the case, not material at this time, the plaintiff in error, Ida McClung, on the 26th day of May, 1900, filed her answer and plea of title in said cause, and asked that the case be certified to the District Court for trial of the issue of title between the parties. The answer, and exhibits thereto, present all the facts involved in the motion to dismiss the proceedings in error in this Court, as well as the consideration of the case upon the merits.

After a general denial of the allegations of the complaint, which included a denial of the plea of title in the plaintiff in that action, plaintiff in error, said Ida McClung, set out in her answer that title to the land before described was in dispute in the action, and that the Justice Court had no jurisdiction to try the same as a case of forcible entry and detainer.

Probably the essential facts set forth in the answer are that Ida McClung is the widow and heir-at-law of Charles R. McClung, who, being duly qualified under the laws of the United States to take, hold, and acquire title to land in the Cherokee Outlet under the Homestead laws, made the race from the outer boundary of said outlet to the land in question, and immediately settled upon the same, claiming it as a homestead, and remained upon the land under such claim, cultivating and improving the same, in full compliance with the Homestead laws of the United States, until his death on the 19th day of November, 1898, and that since his death Ida McClung, his widow, has continued to reside upon, cultivate and improve the land as a homestead, under her claim of ownership therein, by virtue of compliance with the laws of the United States, and has fully complied with all the provisions of the law in that respect. That the land department had erroneously awarded the land to Penny by reason of misunderstanding and misappli-

cation of the law with reference to the qualification of said Penny to hold and acquire title to land, by reason of the fact that Penny violated the Act of Congress and the proclamation of the President opening the lands in the Cherokee Outlet to settlement on September 16, 1893, and that the title to the land being involved, and being the only controversy between the parties, the Probate Court had no jurisdiction to try the cause, and that the same should be certified to the District Court, in order that the real matter in controversy could be determined.

Perry Birdsell was the first to file a homestead entry upon the land. His entry was contested by McClung, and afterwards by Penny, the defendant in error herein. On March 24, 1894, Birdsell's entry was cancelled by relinquishment, and Charles R. McClung made entry of the land. The contest proceeding was continued by Penny against the homestead entry of McClung, and was carried through all the various departments and proceedings of the land department of the United States, and finally resulted in the cancellation of McClung's homestead entry, and the allowance of homestead entry upon the land by Penny.

It appears from the answer and the findings of fact by the department set forth in the answer, that at the hour of opening the lands in the Cherokee Outlet to settlement at 12 o'clock, noon, September 16, 1893, William A. Penny was within the outer boundary of the country known as the Cherokee Outlet, in violation of the Act of Congress and the proclamation of the President, and was at that hour on or near the east bank of the Arkansas river, and near the western border of the Osage Indian reservation, in said outlet, and from that point entered upon the race for the land in question, and by reason of his closer proximity, and on account of his presence within the outer boundary of the country known as the Cherokee Outlet, reached the land in question in advance of McClung. The facts relied upon by McClung being established by the findings of the land de-

partment, the cause presents but a single question of law, if the action was one which, in its nature, would permit of a determination of the question of title.

The only controversy that has ever existed between the parties, or that exists in the present cause, outside of the technical questions, is as to which of the parties actually owns the land, or has the paramount interest or equity therein, under the laws of the United States. Counsel for defendant in error contend that it is not necessary to decide this question in order to determine who was entitled to the possession of the land, and claim that they avoid the necessity of meeting the controversy with reference to the title of the land, or the equities of the parties, by beginning the action before a Justice of the Peace, or Probate Judge exercising the same jurisdiction, and denominating it an action of forcible entry and detainer, at the same time virtually admitting that if the action had been commenced in the District Court the real controversy could have been determined in one action.

The motion to dismiss the proceedings in error presents the sole question involved in the case, as we understand the law, that is, where the plaintiff begins an action, denominating it an action of forcible entry and detainer, before a Justice of the Peace, or Probate Judge exercising the same jurisdiction, and the real matter in dispute between the parties is the ownership of land, does the limit of the jurisisdiction of the Court in which the action is commenced prevent an investigation as to all the rights of the parties, and exclude any controversy as to the ownership of the land in dispute? If the title to the land in question is not involved this Court would have no jurisdiction to determine the controversy, because we admit that the rents and profits of the land do not amount to five thousand dollars, as the case now stands. On the other hand, if the ownership of the land is the real matter in controversy it is admitted by the record that more than five thousand dollars is involved in the suit.

We contend that this is the only question in the case, because the Supreme Court of Oklahoma holds that the title is not involved in the action, and cannot be involved, and that, therefore, they are not called upon to pass upon the actual rights of the parties, while if the title is involved, the Court would necessarily be compelled to investigate all the rights of the parties in the matter in dispute.

Stating the rule in different language, we would say that plaintiff in error contends that the nature of the controversy between the parties determines the Court and the nature and scope of the proceedings, while the defendant in error contends that the selection of the Court and the denomination of the proceedings by the plaintiff in the action determines the nature and scope of the investigation.

Brief and Argument on Motion to Dismiss.

It is not necessary that this Court should be of the opinion from the record presented that the title claimed by the plaintiff in error is, or was, paramount to the title claimed by the defendant in error, but we think it is only necessary that the Court should look far enough into the facts to see that the real matter to be adjudicated is the question of title, and this Court cannot properly determine how that question should be adjudicated until the controversy is before the Court from a Court having jurisdiction to determine that matter, and permit of its being properly brought to this Court for review.

Malloy *vs.* Malloy, 40 N. W., 285.

The motion to dismiss is based upon the decisions of the Supreme Court of the Territory of Oklahoma, and principally upon the case of McDonald *vs.* Stiles, 7 Okla., 327. If these decisions had not recently been departed from by the Supreme Court of Oklahoma Territory, our conclusion as to the extent of the inquiry into the controversy over the title

would be sustained even by the decisions of the Territorial Court. But this conclusion is contrary to the doctrine of the Territorial Court more recently announced, and which we will later refer to, and if this recent construction and decision of the laws of the Territory is to be followed, then the question of title is before this Court for investigation and determination, even in the present form of action.

The decisions of the Supreme Court of the Territory complained of herein, make no reference to the statutes of the Territory, and do not pretend to be any construction of any local statute, but we will set forth the statutes which we believe to be applicable.

Section 9 of the Organic Act of the Territory of Oklahoma, provides that:

> "Justices of the Peace, who shall be elected in such manner as the legislative assembly may provide by law, shall not have jurisdiction of any matter in controversy when the title or boundaries of land may be in dispute."

Section 4005 of the statutes of Oklahoma of 1893 is as follows:

> "Any Justice, within his proper county, shall have power to inquire, in the manner hereinafter directed, as well against those who make unlawful and forcible entry into lands and tenements, and detain the same, as against those who, having a lawful and peaceable entry into the lands or tenements, unlawfully and by force hold the same; and if it be found, upon such inquiry, that an unlawful and forcible entry has been made, and that the same lands and tenements are held by force, or that the same, after a lawful entry, are held unlawfully, then said justice shall cause the party complaining to have restitution thereof."

And Section 4806:

"Proceedings under this article may be had in all cases against tenants holding over their terms; in sales of real estate on executions, orders, or other judicial process, when the judgment debtor was in possession at the time of the rendition of the judgment or decree, by virtue of which such sale was made; in sales by executors, administrators, guardians, and on partition; where any of the parties to the partition were in possession at the commencement of the suit, after such sales, so made, on execution or otherwise, shall have been examined by the proper Court, and the same, by said Court, adjudged legal; and in cases where the defendant is a settler or occupier of lands and tenements, without color of title, and to which the complainant has the right of possession. This section is not to be construed as limiting the provisions of the first preceding section."

And Section 4645:

"If in any action commenced before a Justice it appears to the satisfaction of the Justice that the title or boundaries of land is in dispute in such action, said action shall be stayed before said Justice, and said Justice shall, within ten days thereafter, certify said case, and transmit all papers and process therein to the clerk of the District Court of his county, and said case shall be docketed and thereafter proceeded with in the District Court as if originally commenced therein; the Justice before whom said action is commenced shall require of the defendant setting up said title or boundary, to set forth in his answer or bill of particulars a full and specific statement of the facts constituting his defense of said title or boundary brought in question; and the defendant shall be required to make affidavit of the truthfulness of the statements in his said answer or bill of particulars contained, and that said defense is *bona fide* and not made for

vexation or delay, but for the promotion of justice."

And Section 4646:

"Justices shall not have cognizance of any action * * * in which the title to real estate is sought to be recovered, or may be drawn in question."

Section 4492:

"In any action for the recovery of real property, it shall be sufficient if the plaintiff state in his petition, that he has a legal or equitable estate therein, and is entitled to the possession thereof, describing the same, as required by section one hundred and twenty-seven, and that the defendant unlawfully keeps him out of the possession. It shall not be necessary to state how the plaintiff's estate or ownership is derived."

Section 4493:

"It shall be sufficient, in such action, if the defendant in his answer, deny, generally, the title alleged in the petition, or that he withholds the possession, as the case may be, but if he deny the title of the plaintiff, possession, by the defendant, shall be taken as admitted. Where he does not defend for the whole premises, the answer shall describe the particular part for which defense is made."

Section 4005 (section 127 above referred to):

"In any action for the recovery of real property, it shall be described with such convenient certainty as will enable an officer holding an execution to identify it."

Section 3882:

"The distinction between actions at law and suits in equity, and the forms of all such actions

and suits, heretofore existing, are abolished; and in their place there shall be, hereafter, but one form of action, which shall be called a civil action."

Section 3961:

"The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, where they all arise out of either one of the following classes: * * * Sixth. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same."

Section 3972:

"The answer shall contain: *First.* A general or specific denial of each material allegation of the petition controverted by the defendant. *Second.* A statement of any new matter constituting a defense, counter-claim, or set-off, or a right to relief concerning the subject of the action, in ordinary and concise language, and without repetition. *Third.* When relief is sought, the nature of the relief to which the defendant supposes himself entitled. The defendant may set forth, in his answer, as many grounds of defense, counter-claim, set-off, and for relief, as he may have, whether they be such as have been heretofore denominated legal, or equitable, or both."

We contend that these provisions of the statute control, and compel compliance therewith, and that they cannot be evaded by the selection of the Court in which the action is commenced, or by the title applied to the pleading or process. If the defendant in error has a right to exclude us from the benefits and rights guaranteed by the sestatutes, merely by commencing his action before a Justice of the Peace and putting a name to it which is too small and re-

stricted to admit of an investigation of the real matter in controversy, it is unneccessary to make further investigation, because we admit that a Justice of the Peace has no jurisdiction to try title, either legal or equitable, in any form, or under any name. We contend that the scope of the investigation, and the name and style of the proceedings, are determined by the inherent nature of the controversy between the parties, and in actions of this kind that inherent nature could only appear from the answer of the defendant, and the facts, and that it was just such cases that section 4645 was intended to cover. In the Court below it was insisted that Probate Courts did not possess the extraordinary power of Justices of the Peace in forcible entry and detainer cases, but that contention is not relied upon here.

The decision complained of is in harmony with a part of the other decisions of the Territorial Court, but we do not think that it is sustained by any of the Territorial decisions cited by the learned judge who wrote the opinion, unless, perhaps, it be the case of McDonald *vs.* Stiles, 7 Okla. 327. See Steele *vs.* Noell, 69 Pac. 1077; Brown *vs.* Hartshorn, 69 Pac. 1049; McQuiston *vs.* Walton, 69 Pac. 1048.

We think that all these decisions ignore the law as laid down by this Court in the case of Black *vs.* Jackson, 177 U. S. 349. The Supreme Court of the Territory, under the mandatory injunction proceeding overthrown by the Black-Jackson case, uniformily held that a homestead entry conclusively gave to the holder thereof the right of possession of the entire tract of land embraced therein, and that in such an action the Court could not, and would not, inquire into the rights of the defendant at all. They have been consistent in following that part of the doctrine of the mandatory injunction cases, even in the face of the decision of this Court just referred to. We have admitted in all these cases that a homestead entry, prior to the issuance of patent by the government, gave the right to such possession and priv-

ileges upon the premises as would permit a compliance with the homestead laws of the United States, and that a homestead entry was available for no other purpose, unless it was a valid entry. The United States has not undertaken to guarantee to the holder of a homestead entry, which was allowed in violation of law, anything except the right to comply with the homestead laws, and receive a patent for the benefit of the real owner of the premises, and we deem it unnecessary to cite authorities, other than the case of Black *vs.* Jackson and the cases therein referred to and discussed.

The writer of the opinion complained of herein appears to think that we are asking the Court to cancel the homestead entry, or to investigate the validity therof, for the purpose for which it is held under the homestead laws, but we only question the validity of the entry when the holder thereof seeks to use it for an entirely different purpose, which is, in this case, the right to exclude the plaintiff in error from possession of the land long enough to transfer the same to an innocent purchaser and convert the proceeds to his own use. If the defendant in error has such rights, it should be by reason of compliance with the law, instead of a violation of the law.

We think that the statutes of the Territory are amply sufficient for our protection, if properly applied, and that the Supreme Court of the Territory has construed the statutes in many cases as we contend they should be construed, and the difficulty in this case is, we think, that the Court refused to consider the rights of the plaintiff in error at all. If the plaintiff in error has any rights or vested interests in the matter in dispute, as recognized in the case of Black *vs.* Jackson, he is asserting that right in the present case, and in the only manner in which it could possibly be asserted. Since patent has not issued to the defendant in error, plaintiff in error could not maintain an action to cancel the homestead entry and obtain any affirmative relief, either by

beginning a direct action therefor, or by setting up the same in a cross-petition.

The defendant in error, in his motion to dismiss, relies upon affidavits showing that subsequent to the trial of the present action the legal title has passed from the Government of the United States to the defendant in error. If such facts can be considered at all in this case, we believe them to be in favor of the plaintiff in error, rather than unfavorable, because under the statutes of the Territory and the uniform holding of the Courts under similar code provisions, the question of title could be considered, where the Court had full jurisdiction thereof, and where the nature of the controversy between the parties warranted that sort of investigation.

In the recent decision of the Supreme Court of the Territory in the case of Hackney *vs.* McKee (not yet published), being a case precisely like the one at bar, the Supreme Court have expressed amazement at the fact that any attorney should continue to insist that the title to real estate could be tried or set up as a defense in an action of forcible entry and detainer. Counsel's excuse for presisting in appealing cases like the present one appears in the application for the advancement of the case of Winebrenner *vs.* Forney, and need not be repeated here, even if pertinent to the matter under consideration.

In the Hackney-McKee case the Court cites as authority for the doctrine under consideration, Olds *vs.* Conger, 1 Okla., 232; Oklahoma City *vs.* Hill, 4 Okla., 521; Chisholm *vs.* Weise, 5 Okla., 217; McDonald *vs.* Stiles, 7 Okla., 327; Dysart *vs.* Enslow, 7 Okla., 386; Kirtley *vs.* Dykes, 10 Okla., 16, and two recent Kansas cases following McDonald *vs.* Stiles in their dictum, but in which the facts call for no such doctrine. We think a review of these cases, as well as other decisions of the Territorial Court, both prior and subsequent to some of those cited, would throw light upon the matter under consideration, as the Oklahoma decisions

are relied upon in the motion to dismiss.

The case of Kirtley *vs.* Dykes makes no reference to any question involved in this case.

The case of Olds *vs.* Conger turns on the question of landlord and tenant, and the admissibility of certain evidence, and the question of the right of the defendant to set up his title under the statute and have the case certified to a Court of competent jurisdiction was not involved or in any manner referred to. It is true that the Court lays down the principle of law:

> "In an action of forcible detainer the title to property is not, and cannot be, tried and determined. The right of possession is the only right involved."

This we admit to be a correct statement of the law, but earnestly contend that it applies only to that which is in law and fact an action of forcible detainer, and that if the plaintiff should be mistaken as to the nature of the action and call it an action of forcible entry and detainer, when, in fact, tested by the inherent nature of the controversy between the parties, it should be an action to quiet title, or to enforce a specific performance, or any other sort of action, the doctrine ceases to have application, and the Court did not in that case pretend to say that all cases or actions were forcible detainer where the plaintiff called it an action of forcible detainer.

In the case of Oklahoma City *vs.* Hill the Court followed the familiar doctrine that an unlawful and forcible entry would be corrected in an action of forcible entry and detainer, even though the defendant, at the time of making the unlawful and forcible entry upon the premises, was the owner and entitled to the immediate possession of the premises. Neither the title nor the right of possession constitutes a defense in such an action, and the Court properly disposed of the case upon the facts.

In Chisholm *vs.* Weise the Court followed the same doctrine, in the following language:

> "In an action of forcible entry and detainer, under the statutes of this Territory, it is not competent for the defendant to show, as a defense, that the defendant claimed title, or even owned the title to the premises, where it is shown that the plaintiff was in the peaceable and quiet possession of said premises and was by force, dispossessed thereof by the defendant. A party, out of possession, though he may be entitled to the possession, must resort to legal means to obtain possession."

The Court, in the late case of Hackney *vs.* McKee, also cited two cases from the 7th Oklahoma Report, and we present our suggestions on those two cases, together with the case of Smith *vs.* Kirchner, 7 Okla., 166. These three cases were decided on the same day, and no two of them are in harmony, and not one of the three appears to correctly state the law.

In Smith *vs.* Kirchner the syllabus is as follows:

> "A Justice of the Peace has no jurisdiction in an action of forcible entry and detainer, in which the vendor of real estate brings an action to recover the possession of premises against a purchaser to whom he has made a contract for the sale of the land, and whom he has put in possession thereof, and who has made default in the payment of the purchase price. The remedy is by an action in the District Court to rescind the contract, or to foreclose the equitable interest of the purchaser."

Smith and his wife had purchased a piece of real estate from Kirchner, and had paid $80 upon the purchase price, and agreed to make a further payment of $170 on or before May 9, 1897. The Smiths having failed to pay the last

mentioned sum, Kirchner tendered to them the $80 received, and demanded possession of the premises. Upon refusal of the Smiths to surrender possession, Kirchner commenced an action in forcible entry and detainer. The statutes of the Territory with reference to the nature of the controversies in which an action of forcible entry and detainer would lie are set forth in the opinion, but no reference is made to the statute providing for certifying cases to the District Court where the title to real estate appears to be in controversy, and the Court determined that the cause should be returned to the District Court with the command that the District Court direct the Justice of the Peace to sustain the motion of the defendants below to dismiss the case, and overlooked the fact that the statutes of Nebraska contain no provision like our section 4645. The Court cites a number of authorities under statutes like our own, and which appear to be peculiarly applicable to the case at bar. R. R. Co. *vs.* Scupa, 20 N. W., 393; Molloy *vs.* Molloy, 40 N. W., 285. The last case cited draws a distinction between the doctrine that title cannot be investigated in a forcible entry and detainer case, and the rights of a party claiming title, substantially as follows: "Where a party in possession of real estate (not having entered forcibly) claims an interest in the land itself which only a Court of common law jurisdiction can determine, an action of forcible entry and detainer will not lie against him."

The mistake made by the learned judge in the case of Smith *vs.* Kirchner was in following the Nebraska cases, even to the extent of directing a dismissal of the action, where the title of property appeared to be involved, and overlooked our section 4645. In Nebraska such cases had to be dismissed, because there was no provision for tranferring them to the proper Court.

The language of the Oklahoma Court in the case of Smith *vs.* Kirchner is peculiarly applicable to the case at bar. The Supreme Court has never overruled or questioned the doctrine

of Smith *vs.* Kirchner, except by rendering opinions which appear to be in conflict therewith, and if Smith *vs.* Kirchner correctly states the law, it is peculiarly applicable to the motion of defendant in error, and makes it necessary to dispose of the case in favor of the plaintiff in error. The case fully recognizes the right of the defendant to protect his property interest in the premises in dispute, and that where the title is the matter in controversy the Justice Court has no jurisdiction. The Court uses the following language in the opinion:

> "But the failure to make payment of the note when it was due did not convert the possession into an unlawful possession. The defendants had made a payment upon the land. They had an equity in it. That equity could not be determined under the forcible entry and detainer act. Neither was the Justice of the Peace clothed with equitable jurisdiction to determine the rights of the parties under the contract, and the plaintiff in the action of forcible entry and detainer had no right to disregard the equity in the property, belonging to the defendants, and to proceed by forcible entry and detainer."

In the case at bar the plaintiff in error claims an equity in the land, by virtue of compliance with the laws of the United States, and our contention appears to be fully recognized in the case of Black *vs.* Jackson above referred to, and by Cornelius *vs.* Kessel, 128 U. S. 456–461, and especially by the following language:

> "By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter

is presented so the judiciary can act upon it."

It is admitted by the record before this court that the plaintiff in error has done all things necessary to entitle her to a patent to the land in dispute, unless the defendant in error is entitled to have the legal title of the government conveyed to him. This, we think, constitutes an equity in the premises, and a right which the Court should respect.

In McDonald *vs.* Stiles, the patent to the land in dispute had been issued, and an action of forcible entry and detainer was commenced by the holder of the patent, Stiles. McDonald claimed that the patent had been issued contrary to law, and that the real matter in dispute was the title to the property, and that he was the owner thereof, by virtue of compliance with the laws of the United States. The cases of Oklahoma City *vs.* Hill and Chisholm *vs.* Weise are taken as authority for the doctrine announced by the Court that an equitable defense could not be set up in an action of forcible entry and detainer, and the Court accordingly held that McDonald's plea of title should be stricken out, and that the legal title of the plaintiff in the action could alone be considered, and that the same gave him the indisputable right of possession.

We think there is a broad distinction between the cases cited and the opinion of the Court. It is one thing to dispossess a person by force and violence and enter upon premises in the peaceable possession of another, even though he have title and the right of possession, and quite another to say that a man can be dispossessed of his own property, and that which he has peacefully possessed for years, by on claiming under a void deed, merely because the holder of the void deed saw fit to file his action before a Justice of the Peace, who was without jurisdiction to try the matter in controversy. It seems to us that it would be more just to compel the plaintiff to come into a Court that could determine the real merits of his claims, than to whittle down

or deny the defense and the rights of the defendant, in order to accomodate the case to the jurisdiction of the Court selected by the plaintiff.

The learned judge who wrote the opinion says that:

> "We are satisfied that it was never the intention of the legislature that any question other than that of the right of possession should be tried in this class of cases. It was the purpose to provide a speedy and inexpensive mode of restoring real estate to one rightfully entitled to the same."

Such is doubtless a correct interpretation of the intention of the legislature, but we fail to see why that intention should be construed into a declaration that it was the intention of the legislature by this form of action to enable a person to gain possession of real estate, even though he was not entitled to the possession, merely by commencing the action in the Justice Court, and calling it forcible entry and detainer.

We fail to see how McDonald *vs.* Stiles can be harmonized with Smith *vs.* Kirchner, and Dysart *vs.* Enslow presents some peculiar features not common to either of the others, and does not appear to be in harmony with the law as declared in the other two cases. In the latter case, the plaintiff claimed the right of possession by virtue of a deed which the defendants alleged to be fraudulent and void. The plea of the defendants was on the same theory as in the McDonald-Stiles case, viz: that the jurisdiction of the Court was not sufficient to permit of an investigation of the rights of the defendants. The discussion of the case seems to indicate that the deed really had no bearing upon the matter in dispute, and in this regard the opinion is so indefinite that we can make no application of it. The peculiar feature of the case is, that it denies that an equitable title can be considered at all in a forcible entry and detainer case, and the learned judge cites the Michigan cases, with reference to the

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nature of the title that will sustain an action in ejectment, but the judge goes on to declare that:

> "The principle enunciated in these cases has been asserted by this Court in the case of Olson *vs.* Thompson, 6 Okla., 576."

In order to show the application of the last mentioned case, we quote the syllabus in full:

> "*Replevin—Promissory Notes.* The maker of promissory notes is not the owner nor entitled to the immediate possession thereof unless the same have been paid or cancelled by a decree of Court, or for other reasons have become absolutely void and invalid as obligations in the hands of the payees or third parties; and until such payment or decree, or for other reasons, such notes have become absolutely void, and actions of replevin by the maker for the recovery of the possession thereof, will not lie."

The Michigan cases cited in Dysart *vs.* Enslow are based upon a decision of that Court in Harrett *vs.* Childs, 7 N. W. 63. This case is cited as authority for the Michigan cases above referred to, and the syllabus is as follows:

> "The common law rule, excluding all defences in ejectment not legal in their character, is still in force in the State of Michigan. To an action of ejectment brought by a guardian on behalf of certain wards claiming title by descent, the defendant interposed the defense that his grantor was in possession under a contract for the purchase of the land from a prior owner, when the ancestor of the wards surreptitiously obtained possession of such written contract, and afterwards procured the conveyance to be made to himself. Held, that as the defence was equitable in its nature it could not be properly interposed."

Several cases are cited in support of this doctrine, includ-

ing Foster *vs.* Mora, 98 U. S., 425. It seems evident that the Oklahoma Court overlooked the provisions of the statutes of the Territory with reference to the blending of legal and equitable defences, as well as the construction placed upon that statute by the Supreme Court of Kansas, prior to its adoption in this Territory. It appears to us that the three Oklahoma decisions last discussed, which were delivered and filed on the same day, are not only in conflict with each other, but that neither of them correctly states the law under consideration, and that all are based upon a misapprehension of the authorities cited therein.

We think that Smith *vs.* Kirchner more nearly states the law, and the authorities cited therein with approval are instructive upon the matter under consideration. See Nightingale *vs.* Barnes, 2 N. W., 767; Chicago, B. & Q. R. Co. *vs.* Scupa, 20 N. W., 393. In the last case the action was in forcible entry and detainer, and it appeared from the agreed statement of facts that the land was patented to the railroad company, and was by the railroad company sold or contracted to the defendant, and that the defendant went into possession. That the defendant defaulted in the payments upon his contract, and the contract was cancelled and declared forfeited by the land commissioner of the railroad company. Notice was served in the usual form, preparatory to beginning an action of forcible entry and detainer. Upon presentation of the facts, the Justice, on motion of the defendant, dismissed the cause for want of jurisdiction. The decision of the Justice was sustained by the District Court, and the case was taken to the Supreme Court. The statutory provisions are precisely like those of Oklahoma Territory. In discussing the matter in dispute in the case at bar, the Court there said:

> "It must be further observed, that while the plaintiff might, under the terms of this contract, cancel it and refuse to be further bound by it, in case of default, yet it could not

> do so to the extinguishment of any equities which might exist in favor of the defendant. It may be, and doubtless is, claimed that in this case he has none. This may be true; but if this action can be maintained in this case, it can in any case of the sale of real estate, and all equities in favor of the purchaser completely terminated and cancelled at the will of the vendor by the simple act of the selection of the Court in which he will prosecute his action; for it is well known that no defense of that kind can be made in proceedings under the sections above quoted. So long as the contract continues, so long has the purchaser an interest in the subject of the contract. So long as that interest or title exists, the Justice has no jurisdiction in the case. In an action in ejectment, or other proper proceedings in a Court of general jurisdiction, all equities and defenses can be fully adjudicated. In Justice's Court they cannot be, for the reason that no jurisdiction or authority to do so exists, and, therefore, in suits between vendor and vendee, growing out of the contract of sale, the District Court only has jurisdiction."

It will be noticed that the Nebraska Court also positively asserts the doctrine that title is not involved in a forcible entry and detainer action, but instead of dispensing with the defense in order to make the case fit the Court, they dispense with the Court of limited jurisdiction in order to make the Court fit the controversy between the parties. The only mistake made by the Oklahoma Court in citing and following the decision, is in assuming that Nebraska has a statutory provision like our section 4645, which provides that actions shall be certified to the District Court when title appears to be involved. By a compliance with this statutory provision, the case would be as effectually placed in the District Court for all purposes, as by a dismis-

sal of the proceedings in the Justice Court and beginning a new one in the District Court, as required under the Nebraska statute. The code of Oklahoma Territory, prior to its adoption from the State of Kansas, was construed to make provision for equitable titles, both in support of and in defense to actions of forcible entry and detainer and ejectment.

Alderman *vs.* Beacon, 25 Kan. 658;
Holenback *vs.* Ess, 31 Kan. 87;
Conway *vs.* Gore, 27 Kan. 122.

In the last case, Mr. Justice Brewer, speaking for the Court, says:

> "At that time all the rights and titles held to the premises were equitable, and if these equitable rights may not be shown, if the existence of the naked legal title in the plaintiff shuts out all question of the existence and extent of the defendant's equitable rights, then substantial justice may be sacrificed to mere form. But, as we have said, the law is not so. So far as evidence of title is competent and proof of title affects the action, this kind of evidence and proof of the equitable is as sufficient as of the legal title."

In Duffey *vs.* Rafferty, 15 Kan., 9, the syllabus is as follows:

> "In an action in the nature of an action in ejectment in Kansas the plaintiff may recover if he has any right to the property and if that right is paramount to any right to the same possessed by the defendant, although the legal title to the property may be outstanding in some third person, and although some third person may have a better right to the property than the plaintiff."

See Simpson *vs.* Boring, 16 Kan., 248;
Mooney *vs.* Oleson, 21 Kan., 697;
Gale *vs.* Eckart, et al., 65 N. W., 274.

As a futher evidence of the peculiar state of the law as set forth in the decisions of the Supreme Court of Oklahoma, we will refer to the case of Yingling *vs.* Redwine, 69 Pac., 810. We have already remarked that the doctrine declared in the decision herein complained of has been subsequently adhered to in the same Court in a number of cases involving the same matters of fact, a number of which later decisions have been rendered by Burford, C. J. The Yingling–Redwine case was an action of forcible entry and detainer. Yingling claimed to be the absolute owner of certain real estate, by virtue of a warranty deed from Redwine, and commenced his action of forcible entry and detainer to recover possession. The action was commenced in the Probate Court of Pawnee county, but the jurisdiction of the Probate Court in actions of this kind is conceded to be the same as that of a Justice of the Peace. Redwine claimed in his defense that the deed was given as security for money borrowed, and that the apparent legal title was no more than a mortgage upon the property. Yingling recovered judgment in the Probate Court on this plea of title, and Redwine appealed to the District Court. In the District Court a demurrer was interposed to the evidence of the plaintiff, which demurrer was sustained by the Court, and an appeal was taken to the Supreme Court on the judgment sustaining the demurrer to the evidence. The Supreme Court not only holds that the title of the defendant may be presented and considered in the action, but adjudges the deed to be an equitable mortgage, and fixes the rights of Redwine, the defendant, as owner of the property, subject to a lien of seven hundred dollars secured by the deed.

By a comparison of the Oklahoma decisions it would appear that the Court has confounded the common law definition of forcible entry and detainer with the statutory proceeding, and that they have wholly failed to consider the provisions of the statute with reference to the claim of title or color of title, and this error seems to be indicated

by the opinion in the case of Frantz *vs.* Saylor, decided October 4, 1902 (not yet published), wherein they declare that "a forcible entry is a violent taking by one of lands and tenements occupied by and in the possession of another, by means of threats and force, and without authority of law." The facts in the case were that Frantz commenced an action for a "mandatory injunction," under the proceedings recognized in the Territory prior to the decision in the Black-Jackson case, and obtained a temporary order restraining Saylor from remaining in possession of a portion of the tract of land which both the parties were claiming to be the owner of. Frantz went into possession of this land and remained in possession until the dismissal of the suit and the dissolution of the temporary order of injunction. After the injunction was dissolved and that action abandoned, Saylor demanded possession of the premises which had been so invaded, possession being refused and forcibly withheld, commenced an action of forcible entry and detainer. The Supreme Court held that inasmuch as Frantz had gone into possession without threats, force or violence, though Saylor was prevented from interfering by order of the Court, he could not be dispossessed through an action of forcible entry and detainer.

By reference to page 101 of the American and English Encyclopædia of Law, first edition, it will be observed that the definition of forcible entry declared in the Frantz-Saylor case is the one there set forth, which appears to be the common law definition of forcible entry and detainer, and which has been entirely superceded by modern statutes on the subject. In many States the action is limited to the recovery of the possession which has been forcibly and violently invaded, without regard to the title of the parties or the right of possession, and the Supreme Court has followed the text of the encyclopædia, without regard to the nature of the statute upon which it is based.

The foregoing discussion of the decisions of the Supreme

Court of Oklahoma Territory may appear to this Court unnecessary in view of the law upon the subject declared by this Court in the case of Black *vs.* Jackson, supra, and in the case of Langford *vs.* Monteith, 102 U. S., 145. The last case cited has been universally cited and quoted from in the briefs of counsel for plaintiff in error in the present case, and in other similar cases in the Supreme Court of Oklahoma, but it has not yet been referred to in any of the decisions of the Court, or in any manner discussed, so far as their recorded judgments indicate. Nevertheless we think the case is in point. The case is on error to the Supreme Court of the Territory of Idaho, and the statute involved is almost identical with the statute of Oklahoma upon the subject of transferring causes from the Justice to the District Court. The Idaho statute, section 347, provided that:

> "On trial before a Justice of the Peace if it appear from the plaintiff's own showing or from the answer of the defendant verified by his oath that a determination of the action will necessarily involve the decision of the question of title to real property, the Justice of the Peace shall suspend all further proceedings and certify the case to the District Court of the county, which shall thereafter have jurisdiction over the case as if originally brought in that Court."

If there is any difference between this statute and the statute of Oklahoma on the subject, the difference is in favor of the contention of plaintiff in error in this case. The action was commenced before a Justice of the Peace as an action of forcible entry and detainer, to recover the possion of buildings and grounds, and the complaint charged that the defendant held the property under lease, and that the defendant had entered into possession under an agreement to deliver the possession upon ten days' notice, which notice had been given. The defendant set forth in his

answer that at the time of making the lease to the premises, he was in possession under John B. Monteith, Indian agent, and that he was induced to take the lease by the false representations of the plaintiff that he was the owner of the property, and that the buildings and grounds were, in fact, the property of the United States, and that orders had been issued by the government to defend its possession against the plaintiff The question of title was presented as between the plaintiff in the action, Langford, and the United States, and here again we think the case is far stronger than is really required to sustain the contention of the plaintiff in error in the case at bar, as the defendant in the case at bar, in the lower Court, sets forth equities and title in himself, and not in a third person. But the precise legal question upon the statutes referred to is disposed of by this Court in the language of Mr. Justice Miller, as follows:

> "The record of the case is imperfect, but it appears that the case was an appeal in the District Court from the judgment of the Justice of the Peace, and that the District Court overruled the motion of the defendant to dismiss the case because the Justice of the Peace was without jurisdiction to try it. The same matter was urged in the Supreme Court on appeal from the judgment of the District Court.
>
> We are of the opinion that the Justice of the Peace had no jurisdiction to try the case after the sworn answer of the defendant was filed, and that it was his duty to have certified it for primary trial to the District Court. When it came there on appeal, it should have been dismissed, because there could have been no lawful trial before the Justice."

See Murry *vs.* Burris, 42 N. W., 25.

As we understand the decision of this Court in Black *vs.* Jackson, it sustains the following proposition: First, that the title of the land for possession of which the action was

brought, was in dispute, and that the value of the land fixed the jurisdiction of this Court. Second, that the demurrer to the answer was improperly sustained, and that the answer stated a defense. Third, that it could not be presumed that the plaintiff, who had only a homestead entry, would comply with all the provisions of the law and finally acquire the legal title to the land, so that the rights of the defendant might be fully protected. Fourth, that the defendant had color of title in equity, and a vested interest in the property, including the right of possession of a portion thereof, by virtue of his compliance with the laws of the United States, and that such facts might be made to appear in his behalf upon the trial of the case. Fifth, that the action was triable in the District Court, upon the issues as framed. Sixth, that the plaintiff might bring his action in forcible entry and detainer and recover possession of that portion held by the defendant, unless it appeared that the officers of the land department erred, as a matter of law, in deciding the contest in his favor.

Of course this Court could not presume that the defendant in that case could prove the facts set forth in his answer, but unless the facts as admitted by the demurrer constituted a defense to the plaintiff's cause of action, if established by the evidence upon the trial, there was nothing to try either by the Court or jury, and the ruling of the lower Court sustaining the demurrer would, necessarily, have been sustained. The difference between that case and the one at bar is that Jackson, the plaintiff, made the race from the Chilocco School reservation, while the defendant in error started from a different reservation, within the same prohibited territory. If the question of the validity of the entry from an Indian reservation is a matter that must necessarily be adjudicated in the case at bar, then we repeat that the title to the property is involved in the controversy regardless of how this Court might determine that controversy if properly before it.

We do not apprehend that this Court will determine the qualifications of the defendant in error, or the effect that his entry upon the land from an Indian reservation would have upon the homestead entry in this cause, but, as the case is submitted along with the case of Winebrenner *vs.* Forney, in which the precise question was determined by the Supreme Court of Oklahoma Territory, all the matters in dispute between the parties will necessarily receive consideration, and if this Court should adopt the doctrine laid down in the case of Yingling *vs.* Redwine, then the question of the validity of an entry from an Indian reservation would necessarily be determined in this action, as well as that of Winebrenner *vs.* Forney. Otherwise, we think that this case would have to be reversed and remanded, regardless of the decision of the Court upon the merits of the controversy presented by the record in Winebrenner *vs.* Forney. In any event it might be necessary, in order to protect the rights of the plaintiff in error, to offer some suggestions upon the merits of the real controversy between the parties.

Defendant in error asserts in his motion to dismiss that final proof has been made upon the land in question, and that title thereto is now within the jurisdiction of the Courts of Oklahoma Territory, and that an action of ejectment is now pending, in which all the matters in controversy herein can be determined. In this they are partially mistaken. Jurisdiction over the land remains in the Secretary of the Interior until the legal title, that is, patent from the United States, has actually issued. It is true that for some purpose the land is dealt with after final receipt as though the legal title was in the prospective grantee by patent, but the Secretary retains jurisdiction over the title to the land as long as the naked legal title remains in the Government. This principle has been too long recognized to require the citation of authorities. If the defendant in error should succeed in ousting the plaintiff in error from the possession of the land before the patent actually issues, and an action is

commenced to have the same declared a title in trust for the benefit of the plaintiff in error, the land could, and certainly would, be transferred, and all the rights of the plaintiff in error thereby extinguished. Such has been the history of all these cases, and the anxiety and ingenuity expended upon the various proceedings to get possession without meeting the real matter in dispute is sufficient evidence that there is a controlling interest and purpose back of these proceedings.

The errors assigned in the writ of error in this case which we think directly present the matters discussed, are:

Second, The said Supreme Court of the Territory of Oklahoma erred in holding and deciding that the title and ownership of the land was not involved or drawn in question in said cause by the pleadings and evidence therein.

Third, That said Supreme Court of the Territory of Oklahoma erred in holding and deciding that the allegations of title in the bill of particulars of the plaintiff in said forcible entry and detainer action were but an incident to the right of possession when such allegations were denied and put in issue by the answer of the defendant.

Fourth, That said Supreme Court erred in rendering judgment for defendant in error and affirming the judgment of the trial Court, instead of rendering judgment for the plaintiff in error and reversing the judgment of said trial Court.

Fifth, That said Supreme Court erred in ignoring and refusing and neglecting to pass upon and determine the question as to the validity, as well as the force and effect of the homestead entry, relied upon by the defendant in error in the trial of said cause.

Sixth, The said Supreme Court of the Territory of Oklahoma erred in not holding and deciding that the defendant in error was disqualified to enter and acquire title to the land in question by reason of the fact that he had entered upon the lands embraced within the Cherokee Outlet in vio-

lation of the Act of Congress and the proclamation of the President opening the same to settlement.

Seventh, That said Supreme Court erred in not holding and deciding that said homestead entry could be considered valid and of any force and effect for the purpose only of complying with the laws of the United States and acquiring title to said land, and that when said entry was relied upon as a basis of the right to oust the plaintiff in error from the possession which she had acquired pursuant to the laws of the United States, and by reason of compliance therewith that the Court was then required to investigate and inquire into the validity, as well as the force and effect of said homestead entry for the purpose for which it was sought to be used in said cause.

Eighth, That said Supreme Court erred in not holding and deciding that plaintiff in error had a right, by reason of her compliance with the laws of the United States, to remain in possession of said land for the purpose of protecting her rights until patent had issued and an action could be commenced for the purpose of acquiring the legal title to said land.

These questions were presented in the trial Court (1) by the verified answer and motion to certify the case to the District Court; and (2) by the motion of plaintiff in error, defendant below, addressed to the District Court of Kay County, asking the dismissal of the action on the ground that the title to the premises in question was involved in the action, and that neither the District or Probate Court had jurisdiction to try the same as an action of forcible entry and detainer. (3) By the motion for a new trial.

Suggestions on the Merits.

The case of Winebrenner *vs.* Forney, No. 409, an action to cancel patent, and involving substantially the same facts as the present case, being set for hearing in connection with

this case and presenting only the question of the qualification of a person entering from an Indian reservation to acquire lands in the Cherokee Outlet, we deem it unnecessary to fully discuss that question in this brief, but will make a few suggestions for the purpose of showing that there is an important and substantial question in dispute between the parties, as to who actually has the better title or greater interest in the land in dispute.

Certain lands in the Cherokee Outlet were opened to settlement on September 16, 1893, by virtue of proceedings had pursuant to Section 14 of the Act of March 2, 1899, which section is as follows:

> "Section 14. The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim or interest of every kind or character in and to said lands. Any and all agreements resulting from such negotiations shall be reported to the President and by him to Congress at its next session, and to the council or councils of the nation or nations, tribe or tribes, agreeing to the same, for ratification, and for this purpose the sum of twenty-five thousand dollars, or so much thereof as may be necessary, is hereby appropriated, to be immediately available: Provided, that said commission is further authorized to submit to the Cherokee Indians the proposition that said Nation shall cede to the United States, in the manner and with the effect aforesaid, all the rights of said Nation in said lands, and upon the same terms as to payment as is provided in the agreement made with the Creek Indians of date January 19, 1889, ratified by the present Congress, and if the said Cherokee Nation shall

> accept and by act of its legislative authority duly passed, ratify the same, the said lands shall thereupon become a part of the public domain for the purpose of such disposition as is herein provided, and the President is authorized, as soon thereafter as he may deem advisable, by proclamation to open said lands to settlement, in the same manner and to the same effect as in this act provided concerning the lands acquired from said Creek Indians, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon or occupy the same, and no person violating this provision shall be permitted to enter any of said lands or acquire any right thereto."

Much information with reference to the subject under consideration is contained in the pamphlet entitled; "Executive Document No. 78, 51st Congress, 1st Session. Letter from the Secretary of the Interior transmitted in response to Senate resolution of March 10, 1890; A compilation concerning the legal status of Indians in the Indian Territory."

It will be noticed that neither the subsequent act or the proclamation of the President opening the lands within said described tract ever gave permission to anyone to enter upon any portion of said lands lying west of the 96th degree of west longitude as aforesaid, except a certain residue thereof after exceptions were enumerated in the proclamation of the President, and the qualification of settlers with reference to the point of starting on the race for lands in any portion of said outlet was fixed by this section and the subsequent act of March 3, 1893. Congress had the power to fix the point of starting as an additional qualification of intending settlers.

Smith *vs.* Townsend, 148 U. S., 490.

The Act of 1893, among other things, provided:

"The President of the United States is

> hereby authorized at any time within six months after the approval of this act and the acceptance of the same by the Cherokee Nation as herein provided, by proclamation to open to settlement any or all lands not allotted or reserved, in the manner provided in section thirteen in the act of Congress approved March 2, 1889, entitled, 'An Act making appropriapriations for the current contingent expenses of the Indian Department,' etc. * * * No person shall be permitted to occupy or enter upon any of the lands herein referred to except in the manner prescribed by the proclamation of the President opening the same to settlement, and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior shall, under the direction of the President, prescribe rules and regulations not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands."

The proclamation then proceeds to describe and define the portions of the land embraced within said district from which persons were excluded, and upon which entry or settlement was prohibited, and to set forth what shall be opened to settlement, and we wish here to call attention to the fact that a portion of the lands actually opened to settlement and occupancy consisted of the Pawnee Indian reservation and the Tonkawa Indian reservation, except certain allotments to members of such tribes.

Treaty was completed with the Cherokee Nation of Indians for all lands west of the 96th degree of west longitude to the extent of whatever title or claim they might have therein, and also with the two tribes just mentioned, which had been settled upon said Cherokee Outlet, and their lands

purchased from the Cherokee Nation of Indians. All statutes and public papers with reference to the opening of the lands in the Cherokee Outlet, dealt with the country known as the Cherokee Outlet, and referred to the same as the entire tract of country considered or opened, and while certain designated portions of the outlet including land formerly the property of the Pawnee and Tonkawa Indians was declared opened to homestead settlement and occupancy, all lands including the Indian reservations not actually subject to homestead entry were included in the exceptions enumerated by the President in the proclamation.

The defendant in error contends that the tract of country referred to in the proclamation upon which parties were forbidden to enter, includes only such portions of the Cherokee Outlet as was actually opened and made subject to homestead entry and settlement. The plaintiff in error contends that all the country embraced within what is known as the Cherokee Outlet, being that tract of country lying west of the 96th degree of west longitude, etc., constituted the prohibited district, and that the qualification of settlers and the actual tracts of land to he occupied, in so far as the same relates to the prohibition contained in the act and proclamation, are separate and entirely different matters. We think it was the intention of Congress and the President to forbid persons to enter upon any territory which was actually described in the act and proclamation, and which the plain and unmistakable language of the acts and proclamation say that persons should not enter upon. We think the entire tract of country was dealt with, and that the line of prohibition extended around its outer boundary, regardless of what parcels or tracts of land within the main tract were actually subject to occupancy. If such was not the case we see no reason why these Indian reservations should have been excepted along with School reservations, the Chilocco Indian reservation, Saline reservation, etc. In other words, if these reservations were not included in the

tract of country being dealt with, why were they withheld from it by the proclamation? We think the contention of defendant in error here presents precisely the same question that was presented in Smith *vs.* Townsend, supra.

If that portion of the Cherokee Outlet after deducting all reservations from occupancy and homestead entry is to be considered the "entire tract of country" referred to in the acts and the proclamation, then defendant in error is correct in his contention. But such conclusion would include the privilege on the part of all intending settlers to go upon all reservations within the Cherokee Outlet, or the large number of School reservations adjoining the border, or even to follow the reservations for public roads throughout every portion of the entire tract of country, and there would remain nothing that could be called an entire tract of country except a quarter section or other legal subdivision under the United States survey.

It appears to us that Congress and the President intended to avoid the controversy which arose in Smith *vs.* Townsend, and to so definitely describe the entire tract of country opened to settlement, and to so specifically and certainly enumerate all portions thereof which could not be occupied, and so unmistakably fix the outer boundary and define what was called the "entire tract of country," that no possible controversy could arise. That the President understood that entry was prohibited upon all the country known as the Cherokee Outlet is made plain by that portion of his proclamation dealing with the one hundred foot reserve upon which intending settlers were permitted to make entry for the purpose of starting in the race, which is as follows:

> "A strip of land one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation is hereby temporarily set apart for the following purposes and uses, viz: said strip of land,

> the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet shall be opened to occupancy in advance of the day and hour named for opening said country by persons expecting and intending to make settlement pursuant to this proclamation," etc.

Even if the land had not before been specifically described by metes and bounds, and the eastern boundary fixed at the 96° of west longitude, and the northern boundary at the State of Kansas, this designation of the country known as the Cherokee Outlet could leave no uncertainty as to the starting point for intending settlers. The name Cherokee Outlet was derived from the purpose for which the lands were granted to the Cherokee Indians, and whether it shall hereafter be used as homestead land, as at present, or for any other purpose, all persons at all familiar with the history of the country will forever know that the Cherokee Outlet means a strip of country extending from the western border of the Cherokee Nation as far west "as the sovereignty of the United States and their right of soil extends."

If our contention as to the description of the country which persons were forbidden to enter upon or occupy is correct, under the plain language, meaning and purpose of the Act of Congress and the proclamation of the President, we have nothing to do with the reasons for this portion of the qualification of settlers. It is enough that Congress has expressed its intention. But the defendant in error, and those claiming under the same facts, seeks to introduce confusion by speculating on what the President intended to say, and what Congress ought to have said, and the Supreme Court of the Territory, in the case of Winebrenner *vs.* Forney, we think have given but slight consideration to the actual language of the act and proclamation, and have dealt almost entirely with these speculations as to what might have been or should have been said by the President.

The learned judge who delivered the opinion of the Court in the case or Winebrenner *vs.* Forney marks out what he calls reservations, and then designates the residue as "land opened to settlement," ignoring the fact that almost one-fourth of the portion of the outlet which he has designated as land opened to settlement was also reserved for homestead settlement.

It was contended by the defendant in error in the lower Court that the Indian reservations within the Cherokee Outlet could not have been included in the general description of lands, entry upon which was prohibited, even though the actual exterior boundaries were properly described, for the reason that certain portions of the Cherokee Outlet had been sold to friendly Indians, and that Congress and the President could have been dealing only with the residue of the outlet. A single suggestion we think is sufficient to dispose of this contention, even though we go out of the language of the act and the proclamation, and enter the contest in the realm of speculation. The Pawnee Indian reservation and the Tonkawa Indian reservation consisted of lands purchased from the Cherokee Indians, under the treaty providing for the settlement of the friendly Indians upon the outlet. If they ceased to be a portion of the outlet by virtue of that settlement and occupancy, surely they could not again become a portion of the outlet by reason of their purchase by the United States for the purpose of adding the same to the public domain. And the contention of the defendant in error, when tested by this simple example, would necessarily exclude the Pawnee Indian reservation and the Tankawa Indian reservation from the "country known as the Cherokee Outlet."

The learned judge who delivered the opinion in the Winebrenner–Forney case based his judgment almost exclusively upon the fact that the failure to place the one hundred feet reservation immediately around the various tracts of land opened to occupancy would make much of the coun-

try opened to settlement inaccessible on account of the distance from the one hundred-foot reservation to the desired land, and then disposes of the whole matter by the presumption that the President did not do such a foolish and unnecessary thing.

The western boundary of the Osage Indian reservation is the center of the channel of the Arkansas river, the bed of which is about one mile in width, and at low water the stream is about five hundred to eight hundred yards wide, and from five to fifteen feet deep. If this was a contest between presumptions, we would insist that the President, did not intend to locate intending settlers in this center of this river until the hour for opening the land to settlement.

Again, the grazing lands in the western portion of the Cherokee Outlet are so nearly worthless that a very small portion thereof has ever been taken under the homestead laws, and practically none of the same was occupied, outside of a few watered tracts, that were valuable in connection with the grazing districts, until the last two or two years. This western portion was from one hundred and fifty to one hundred and ninety miles from the rich lands along the Arkansas river, and again we think the weight of presumption is on the side of the plaintiff in error. It is quite probable that the President did not expect people to enter upon the lands from the eastern boundary of the Cherokee Outlet, any more than he expected them to go the western boundary and run a distance the length of the Outlet to get to the rich lands along the rivers on the east. It was merely intended that the Outlet should be used where people desired to use it, and none were compelled to go to a remote distance from the land they desired.

Again, the Supreme Court of Oklahoma insist that the lands opened to occupany are all that is included within the prohibited district. We repeat that there is no authority for such an assumption, and it does violence to the plain and unmistakable language of the Act of Congress and the

proclamation of the President. It is immaterial weather one was insane enough to go to the eastern end of the outlet, or to the western end, or to stand in the middle of the Arkansas river until the hour of the opening.

What the President intended, and the meaning of the language of the Act of Congress and the proclamation of the President, is most clearly and positively set forth by what the President and Secretary actually did at the time of, and immediately following, the promulgation of the proclamation. All persons were excluded from the Indian reservations within the Cherokee Outlet. They were not only warned that they would lose their right to occupy any portion of the lands opened to settlement, but they were commanded by the soldiery of the United States under the direction of the secretary of War, who, we presume, was acting directly under the command of the President, to leave the reservations. Persons found trespassing upon these reservations within the Cherokee Outlet were arrested and placed in the guard house, and the command of the soldiers with reference to the time of entering upon the homestead lands was enforced in at least one instance by the shooting and killing of the intruder, all of which appears from the report of the Secretary of War with reference to the proceedings of his department with reference to the opening of lands within the Outlet.

A great many persons made inquiry of the Secretary with reference to their right to enter upon these reservations, and in every instance they were warned that no such right existed. These warnings were widely published, at least by the consent, if not the direct authority, of the President and Secretary, and all persons had full knowledge thereof. The Interior Department has taken judicial notice of the fact that more than one hundred thousand people collected upon the borders of this country, and out of that vast number the records of the department show that not more than fifteen or twenty persons ever entered from the Indian res-

ervations on the east and made claim to lands in the outlet

The law and the proclamation with reference to this opening was applied in contest proceedings in the department as it had been before construed until December, 1896, more than three years after the opening, and until after there had been a change in the office of Secretary of the Interior. We think the contemporaneous construction of the act, leaving out of consideration the equities of the parties, is of vast importance, and in case of doubt or uncertainty as to the meaning of the law and proclamation, should be given controling importance in this case.

United States *vs.* State Bank of North Carolina, 6 Peters, 29–40.
United States *vs.* Moore, 95 U. S., 760.
United States *vs.* Johnson, 124 U. S., 236.
Pennoyer *vs.* McConnaughey, 140 U. S., 1.
United States *vs.* Alabama, etc., Ry. Co., 142 U. S., 615.

In the last case the Court says:

> "It is a settled doctrine of this Court, in case of ambiguity, the judicial department that will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced."

In the case at bar plaintiff in error not only insists upon his lawful right to the land by virtue of his qualification to enter the same, and compliance with the laws of the United States in making that entry, but had expended more than three years labor of himself and family upon the land prior to the change in the construction of the law under which he entered. And, again, he was not only controlled by his

opinion of the law, and by what appeared to be its plain language, as well as the universal construction thereof by practically every lawyer in the country, as well as the President and Secretary and all the departments of the government, but he was compelled to yield to the judgment of the nation and its people by the guns of the soldiers.

In the case at bar it will be noticed from the decisions attached to the answer of the plaintiff in error, that these few people who defied the law and power of the United States and by stealth and cunning, gained entry into the outlet, not only secured an advantage over the vast multitude who, voluntarily or otherwise, yielded to the commands of the government and rendered obedience to its laws and the construction thereof by the various departments, but on page 46 of the Record it appears that the department did not even require the usual settlement, occupancy and cultivation by those so especially favored.

For the conflicting constructions of the law and the proclamation by the land department in the leading cases, see Cagle *vs.* Mendenhall, 20 L. D., 440; Brady *vs.* Williams, 23 L. D., 533; 25 L. D., 402.

As a more full discussion of the question with reference to the legality of the entry into the outlet, as well as maps and other documents and citations will be presented to the Court in the case of Winebrenner *vs.* Forney, No. 409, we will submit the matter with these brief suggestions.

Respectfully submitted,

S. H. HARRIS,
For Plaintiff in Error.

J. J. DARLINGTON,
Of Counsel.

SEP 15 1902
JAMES H. McKENNEY,
Clerk.

Motion to dismiss.

—IN THE—

SUPREME COURT

Filed Sept the 15, 1902.

UNITED STATES.

IDA McCLUNG,
Plaintiff in Error,

vs.

WILLIAM A. PENNY,
Defendant in Error.

384

Motion to Dismiss Petition in Error and Appeal.

C. W. RANSOM and
DALE & BIERER and
A. G. C. BIERER,
Attorneys for Defendant in Error.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

IDA McCLUNG,
Plaintiff in Error,

vs.

WILLIAM A. PENNY,
Defendant in Error.

MOTION TO DISMISS PETITION IN ERROR AND APPEAL.

Comes now the defendant in the above entitled cause and moves the court to dismiss the petition in error and the appeal in this cause for the reason that this court has no jurisdiction to hear and determine the cause here sought to be presented, because the cause is not one in which the

judgment of the Supreme Court of the Territory of Oklahoma is subject to review by this court.

This cause was originally an action of forcible entry and detainer brought in a justice's court in Kay county, Oklahoma Territory, by William A. Penny against the present plaintiff in error, Ida McClung. The cause was taken by Ida McClung on appeal to the district court of Kay County, Oklahoma Territory and on judgment being rendered for William A. Penny, Ida McClung appealed to the supreme court of Oklahoma Territory, where the judgment against her was affirmed, and which judgment she now seeks to have reversed by this court.

The only thing involved in this cause is the possession of about one hundred and twenty-four (124) acres of land of the rental value of Five ($5.00) Dollars per acre, or Six Hundred and Twenty ($620.00) Dollars per annum. The title to the land is not involved in this cause.

On August 24, 1901, William A. Penny received his final duplicate receipt for the quarter section of land of which the 124 acres is a part, and subsequently brought an action in ejectment to recover the land possessed by Ida McClung and to bar her from any further claim to the quarter section of land. This action resulted in a judgment for William A. Penny, from which Ida McClung appealed to the supreme court of the territory, where the cause is now pending and submitted for the decision of that court. This action gives notice to all persons of the claim of Ida McClung to the land, and in this action the ownership of this land will be fully settled.

The claim of the defendant in error is that only the

possession of the 124 acres of land of the annual rental value of $620.00 is in dispute in this cause. Therefore, "the value of the property or the amount in controversy" does not "exceed five thousand dollars" and the jurisdiction of this court to review the judgment appealed from is not invoked.

The affidavits of William A. Penny, C. V. Harris, John F. Bainum, C. F. Harris, F. C. Butterfield and Michael Brady and a copy of the final receipt of William A. Penny are attached hereto and made a part of this motion.

Wherefore, defendant in error prays that this proceeding be dismissed.

C. W. RANSOM and
DALE & BIERER and
A. G. C. BIERER,
Attorneys for Defendant in Error.

In the Supreme Court of the United States.

IDA McCLUNG,
Plaintiff in Error,
vs.
WILLIAM A. PENNY,
Defendant in Error.

AFFIDAVIT.

TERRITORY OF OKLAHOMA, }
County of Kay, } ss.

William A. Penny being first duly sworn, says that he is the defendant in error in the above entitled cause.

That the only thing involved in said cause is the possession of about one hundred and twenty-four acres of the Southwest Quarter (¼) of Section Thirty (30) and Township Twenty-six (26), North of Range One (1), East of the Indian Meridian, in Kay County, Oklahoma Territory; that this action is a forcible entry and detainer action and does not involve the title of said Quarter (¼) Section of land, but only the possession of the part sued for; that the reasonable annual rental value of said land held by Ida McClung against this affidavit, is not more than $5.00 per acre or $620.00 per annum for the land which plaintiff holds from this affiant, and that affiant is well acquainted with the reasonable rental value of land per acre in the vicinity where the land in controversy is located.

Affiant further says that he has made final proof on said land under his homestead entry thereto, and his said final proof has long since been presented to, and accepted by the Register and Receiver of the local land office at Perry, Oklahoma Territory, in which district said land was located at the time, and that on the acceptance of said final proof there was issued to this affiant by the Receiver of said land office, a final receipt for said land, a true and correct copy of which final receipt is hereto attached and marked "Exhibit A" and hereby made a part of this affidavit; that affiant therefore does not hold said land under homestead entry subject to relinquishment by him, but holds it under said final receipt evidencing the grant of said land by the Government of the United States to him.

Affiant further says, that subsequent to his obtaining said final receipt for said land, he being the owner thereof, brought an action in the nature of an action in ejectment under the laws of the Territory of Oklahoma in the District Court of Kay County, against Ida McClung to recover all of said land and to bar the said Ida McClung from any further claim thereto and that said action resulted in a judgment in favor of this affiant; from which the said Ida McClung is now prosecuting her appeal in the Supreme Court of the Territory of Oklahoma, where said action is now pending and submitted for a decision of the court; and that said action will determine the ownership of said land.

The pendency of said action gives notice to all persons of the claim of Ida McClung to said land.

WILLIAM A. PENNY,

Subscribed and sworn to before me this the 2nd day of August, 1902.

E. E. CASS,

Notary Public.

My commission expires on the 6th day of July 1903.

[SEAL.]

TERRITORY OF OKLAHOMA, }
County of Kay, } ss.

C. V. Harris, John F. Bainum, C. F. Harris, F. C. Butterfield, and Michael Brady, each being for himself duly sworn, says, that he has read and knows the contents of the above and foregoing affidavit; and that he is also personally acquainted with the parties thereto and with the tract of land, the possession of which is in controversy in the above cause; and that he knows the reasonable annual rental value thereof, and that said Ida McClung withholds from the possession of said William A. Penny about one hundred and twenty-four (124) acres of said Quarter (¼) Section of land and that the reasonable value of said land so withheld by her is $5.00 per acre, or $620.00 per annum for the land so withheld; that the allegations of the above and foregoing affidavit of William A. Penny are true.

C. V. HARRIS,
JOHN F. BAINUM,
C. F. HARRIS,
F. C. BUTTERFIELD,
MICHAEL BRADY.

32799

Subscribed and sworn to before me this the 2nd day of August, 1902.

E. E. CASS,

Notary Public.

My commission expires on the 6th day of July, 1903.

[SEAL.]

EXHIBIT A.

COPY.

4-140.

Final Receiver's Receipt No. 3781. Application No. 10605.

HOMESTEAD.

Receiver's Office, Perry, Oklahoma Territory.

August 24th, 1901.

Received of William A. Penny the sum of Four Dollars ..... cents being the balance of payment required by law for the entry of Lots Three and Four and the East Half of the Southwest Quarter,

Duplicate.

of Section Thirty in Township 26, North of Range One, East I. M. containing 164.01 acres, under section 2291 of the Revised Statutes of the United States.

JOEL R. SCOTT,

Receiver.

$4.00.

$0.90 Testimony fee received. Number of written words 600. Rate per 100 words fifteen cents.

JOEL R. SCOTT,

Receiver.

Endorsements.

18733.

TERRITORY OF OKLAHOMA, } ss
Kay County, }

Filed for record this 3rd day of Sept. A. D., 1901, at 2:50 o'clock p. m., recorded in book 2, page 32.

E. D. JOHNSON,
Register of Deeds.

Service of the above and foregoing motion and the affidavits thereto attached, as herein above shown, is hereby accepted and I acknowledge the delivery to me of a true and correct copy thereof this 18th day of August, 1902.

S. H. Harris,
Attorney for Plaintiff in Error.

32800

In the Supreme Court of the United States.

IDA McCLUNG,
Plaintiff in Error,
vs.
WILLIAM A. PENNY,
Defendant in Error.

To S. H. HARRIS, Attorney for Plaintiff in Error:

You are hereby notified that on Monday, the 6th day of October, 1902, the Defendant in Error will present his motion with affidavits in support thereof to the Supreme Court of the United States at the court room in the city of Washington, District of Columbia, United States of America, to dismiss the appeal in the above entitled cause.

A true copy of said motion and the affidavits attached thereto, and the brief of defendant in error in support of said motion are served upon you with this notice.

C. W. RANSOM and
DALE & BIERER and
A. G. C. BIERER,
Attorneys for Defendant in Error.

Service of the above and foregoing notice is hereby accepted this 18th day of August, 1902.

S. H. HARRIS,
Attorney for Plaintiff in Error.

No. 384.

Brf. of Brarer for D. (Gr. mo.)

Office Supreme Court U.S.
FILED
Oct 18 1902
JAMES H. McKENNEY,
Clerk.

—IN THE—

SUPREME COURT

Filed Oct. 18, 1902.

UNITED STATES.

IDA McCLUNG,
Plaintiff in Error
vs.
WILLIAM A. PENNY.
Defendant in Error

384

Brief on Motion to Dismiss Petition in Error and Appeal.

C. W. RANSOM,
and
DALE & BIERER,
Attorneys for Defendant in Error.

—IN THE—

SUPREME COURT

—OF THE—

UNITED STATES.

IDA McCLUNG,
Plaintiff in Error

vs.

WILLIAM A. PENNY.
Defendant in Error

BRIEF ON MOTION TO DISMISS PETITION IN ERROR AND APPEAL.

The defendant in error asks the court to dismiss the petition in error and appeal in this court for the reason that this court has no jurisdiction to review the judgment appealed from.

Section 9 of the Organic Act of Oklahoma (26 St. 81, 85) provides:

"Writs of error and appeals from the final decisions of said Supreme Court shall be allowed and may be taken to the Supreme Court of the United States, in the same manner and under the same regulations as from the Circuit Courts of the United States, where the value of the property or the amount in controversy to be ascertained by oath or affirmation of either party or other competent witnesses, shall exceed five thousand dollars."

The judgment of the district court of Kay county, Oklahoma Territory, which was affirmed by the Supreme Court of the Territory, adjudged that the plaintiff, William A. Penny, have restitution in a forcible entry and detainer action of the quarter section of land described in the judgment. No part of the decree affected the title to the land. The affidavit of William A. Penny, corroborated by the affidavit of five other witnesses, states that only the possession of 124 acres of the quarter section of land described in the pleadings in the trial court are involved in this cause, and that the annual rental value of said land is five dollars ($5.00) per acre, making only a total of Six Hundred and Twenty ($620.00) Dollars per annum. The showing of defendant in error also discloses the fact that on August 24, 1901, a final receipt was issued by the Receiver of the United States Land Office at Perry, Oklahoma, for this land, thus taking the land out of the category of homestead lands subject to relinquishment, so that Penny might by relinquishment defeat the right of Ida McClung as claimed in the affidavits of plaintiff in error which she files in order to show that this court has jurisdiction. The final receipt having been issued, we contend that the land is private property, and in no sense homestead lands of the United States subject to the mere inchoate right of a homestead entry which might be cancelled by relinquishment of the entryman and the land acquired by an innocent third party. The land is now private property and transferrable by deed of William A. Penny. Penny's affidvait, corroborated as above stated, also shows that subsequent to the obtaining of the final receipt on August 24, 1901, he being the owner of the land,

brought an action in ejectment in the district court of Kay County against Ida McClung to recover all of said land and to bar the said Ida McClung from any further claim thereto, and that in this action a judgment was rendered for Penny, from which she now prosecutes her appeal in the supreme court of the territory where the cause has been submitted for decision of the court, and that this action will determine the ownership of the land, and that the pendency of this action gives notice to all persons of the claim of Ida McClung to this land.

We, therefore, contend that the title or ownership of the land, valued by the plaintiff in error in her showing at more than five thousand dollars, is in no way involved in this cause; that that property is involved in another action pending in the court from which this appeal is taken; but that in this action only the value of the possession, not worth more than $620.00 per annum is involved, and that the amount in controversy, therefore, is not shown to exceed five thousand dollars in order to give this court jurisdiction in this cause.

We presume that plaintiff in error will rely upon the decision of this court in the case of *Black vs. Jackson,* 177 U. S. 349, where the court said:

"Although the naked legal title remains in the United States in trust for the person who may earn it, we think that in determining the value of the matter in dispute we should look at the value of the land, not simply at the value of the right of present possession."

That, however, was in a case where the court found that the defendant "proceeds in his defense upon the ground that after residing upon the land for the period designated in the statute he will be entitled under the law to a patent.

It ought not to be assumed that he will put himself in such position that he cannot demand a patent,"

And where the court further held,

"The demurrer admitted the averment in the answer to the effect that the land with the defendant's improvements thereon could be transferred in the manner stated in the answer for the sum of $6,000.00."

No such cause is presented here. In that case the court proceeded upon the theory that the title to the land was involved, and that the situation was such that a transfer by relinquishment of the homestead entry of Jackson would be a loss to Black, if he were dispossessed from the land, of the value of the land admitted to be $6,000.00. In this cause there is no title to the land involved, and it is not subject to the relinquishment of Penny so as to defeat the rights of Ida McClung. On the other hand, her rights will be fuly protected in an appropriate action of ejectment involving the title and ownership to this land, and which action is now pending in the courts of Oklahoma.

That the title to this land can in no way be involved in this action has been repeatedly settled by decisions of the supreme court of Oklahoma Territory.

In the case of *McDonald vs. Stiles*, 7 Okla. 327, the supreme court said:

"The action of forcible entry and detainer is purely a possessory action, and the question of title or boundaries cannot properly arise or be tried in such a proceeding."

This rule was followed in *Dysart vs. Enslow*, 7 Okla. 386, and *Coke vs. Braden*, 67 Pac. 475.

The judgment in this cause is in no way a bar to any other action brought by either party to this suit.

Section 4807 Oklahoma Statutes of 1893, provides:

"Judgments, either before a justice or in the district court, in actions brought under this article, shall not be a bar to any other action brought by either party."

This section was adopted in Oklahoma from the statutes of Kansas where the section has been repeatedly construed.

In the case of *Waite vs. Teeters,* 14 Pac. 146, the supreme court of Kansas said:

"An action of forcible entry and detainer by a landlord against a tenant for the restitution of the whole or part of a farm does not necessarily involve the ownership of the corn grown by the tenant upon the farm during his occupancy; and a judgment in such action is no bar to an action by the tenant against the landlord for the conversion of such corn, or to any after-action brought by either party."

In the case of *Redden vs. Tefft,* 29 Pac. 157, it was contended that the judgment in a forcible entry and detainer action theretofore entered barred the pending suit. The court answered this as follows:

"Two sufficient answers dispose of this contention: First. Article 13 of procedure before justices, relating to forcible entry and detainer, provides that "judgments, either before a justice or in the district court, in action brought under this article, shall not be a bar to any after-action brought by either party."

There being then nothing involved in the case but the possession of the land worth not more than $620.00 per annum, and the judgment appealed from being such as can in no way be a bar to or affect the title to this land which is in litigation by the parties in another action, we contend that the court should not entertain this appeal. The property which is the subject of the possession not being involved, its value should not be considered, and the jurisdiction of this court will depend entirely then on the

"amount in controversy" exceeding "five thousand dollars."

A construction of similar language in the Organic Acts of the Territories has several times been before this court.

In the case of *Potts vs. Chumasero*, 92 U. S. 358, which was a proceeding in eror from the supreme court of the Territory of Montana, the court said:

"In *Barry vs. Mercien*, 5 How. 120, it was held, Chief Justice Taney speaking for the court, that, in order to give us jurisdiction in a case dependent upon the amount in controversy, "the matter in dispute must be money, or some right, the value of which in money can be calculated and ascertained."

The case of *United States vs. Railroad Co.* 105 U. S. 263 was on error to the supreme court of the Territory of Wyoming. The action was one to replevin certain goods of the United States on which the railroad company was adjudged to have a lien of $586.16. This court held that a writ of error would lie to the supreme court of Wyoming only when the amount in controversy exceeded one thousand dollars, and dismissed the appeal.

So, by parity of reasoning, we claim that it is not the value of the land, as in that case it was not the value of the goods, but the value of the possession, as in that case it was the value of the lien which determines this court's jurisdiction.

In the case of *Lownsdale vs. Parish*, 21 How. 290, the action was on an appeal from the supreme court of the Territoy of Oregon. The complaint of the plaintiff was against the obstruction of a street in the city ot Portland opposite his lots. The court held the title to the ground which was he subject of the action was not in controversy,

and as the amount of damages which the plaintiff would incur by the occupation of the street by the defendant was not shown, that this court had no jurisdiction of the appeal.

In the case of *Kurtz vs. Moffit*, 115 U. S. 487, the court said:

"From this review of the statutes and decisions, the conclusion is inevitable that a jurisdiction, conferred by congress upon any court of the United States, of suits at law or in equity in which the mater in dispute exceeds the sum of value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money."

This being true, if the proceedings in error present a case of this character where the right involved is capable of being valued in money, then it is incumbent upon the appellant to shew to this court in the appeal from the supreme court of Oklahoma Territory that the amount of money involved exceeds $5,000.00.

The case of *Cameron vs. United States*, 146 U. S. 533 was one brought by the Government to abate a wire fence on lands in the Territory of Arizona. The court in dismissing the appeal said:

"It is not, however, the value of the property in dispute in this case which is involved, but the value of the color of title to this property, which is hardly capable of pecuniary estimation, and if it were, there is no evidence of such value in this case. Had the defendant succeeded in the action he would not have established a title to the property, but a color of title to it, and the adjudication would have been of no value to him, except so far as to permit the fence to stand. He could not have made it the basis of an action of ejectment or other proceeding to test his actual title to the premises in question."

The value of the land there in dispute was shown by

affidavit to be more than five thousand dollars, and the chief justice in the alowance of an appeal found that the property in controversy exceeded that sum, but the property itself not being in controversy and not being for determination in that cause its value could not be made the basis of the court's jurisdiction. And so we claim here there being nothing in controversy except the value of the possession, which is worth only a fraction of $5,000.00, the cause is not one within the jurisdiction of this court.

The case of *Carne vs. Russ,* 152 U. S. 250 was an action in equity by the owner of land worth $40,000.00 to set aside and cancel a cloud theron created by tax title. The sum adjudged to the defendant was less than $5,000.00, the jurisdictional amount. This court dismissed the appeal holding that the money adjudged to the defendants as their claim against the land was the only matter in controversy, and that the value of the land could not give this court jurisdiction of the appeal.

The only cases which we have been able to find exactly in point with the case at bar are two decisions of the supreme court of Louisiana.

In the case of *In Re. Genella,* 14 So. 302, the supreme court of that state held:

"Where the issue between the parties to a suit is not the right of ownership, but the right of possession, and the value of the latter right is as to amount below the appellate jurisdiction of the supreme court, an appeal taken to that court will be dismissed *ex proprio motu.*"

In the case of *Lea vs. Orleans,* 16 So. 456, the same court held:

"Where the issue in a case is not the right of ownership of specific property, but of the possession thereof, it is the value of the latter right which determines the jurisdiction on appeal of the supreme court."

We, therefore, very respectfully ask that the petition in error, the appeal, and these proceedings be dismissed.

C. W. RANSOM,
and A. L. C. Bierer
of DALE & BIERER,
Attorneys for Defendant in Error.

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IN THE

Supreme Court,

OF THE UNITED STATES.

October Term, 1902.

IDA McCLUNG, *Plaintiff in Error,* vs. WILLIAM A. PENNY, *Defendant in Error.*	*No. 384.* *In Error to the Supreme Court of Oklahoma.*

BRIEF OF DEFENDANT IN ERROR.

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Attorneys for Defendant in Error.

REPUBLICAN PRINT, PERRY, OKLA.

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BRIEF OF DEFENDANT IN ERROR.

On Motion to Dismiss Plaintiff's Cause in Trial Court and Motion to Dismiss Appeal, and on the Merits of the Case.

STATEMENT OF FACTS.

MAY IT PLEASE THE COURT:

We desire it clearly understood, that at the time this action was brought, both the legal and equitable title to the land in controversy

was still vested in the United States. William A. Penny had the homestead entry thereon in the Land Department, which entry had not passed either to final proof or patent. Ida McClung necessarily had no form of title thereto, and no right of possession therein.

Theretofore, and in the contest case of William A. Penny vs. Charles R. McClung, the Interior De partment had determined that the rights of William A. Penny, were prior and superior to the claim of said Charles R. McClung; and Ida McClung his widow had no status except that of a defeated homestead claimant.

That when this action was brought, Ida McClung was in possession of the entire tract, and William A. Penny, had merely standing room for his house, in the middle of the public highway. That Ida McClung and her husband had theretofore fenced the entire tract, and forcibly excluded William A. Penny from the use and enjoyment of any part thereof.

That this is an action brought by a successful homestead claimant, who is out of possession, against his defeated adversary for the possession of the tract, to the end that he may cultivate and improve the same as required by the homestead laws, and thus obtain title to the land. It is a suit brought while the matter is still *in fieri* in the deparmtment of the Interior to give effect in the local courts, to the Department's

decision, by placing the successful claimant in position to comply with the requirements of the homestead laws.

We, also deny, the statement by plaintiff in error that the record shows that William A. Penny, was within the outer boundary of the "country known as the Cherokee Outlet," at twelve o'clock, noon, September 16th, 1893; that the fact is that he was at that time on the eastern boundary of said Outlet. We beg to differ with counsel as to the construction to be placed upon the phrase "Country known as the Cherokee Outlet."

We assert that the Department of the Interior has uniformly construed the President's Proclamation as placing the one hundred foot strip immediately on the eastern boundary of the land opened to settlement, and has never held any settler disqualified for running from that portion of that Strip. That the phrase, "the country known as the Cherokee Outlet," has been uniformly and properly construed by the department as synonomous with the phrase, "the entire tract of country to be opened to settlement under this Proclamation."

BRIEF.

The Judgment of the Supreme Court of the Territory of Oklahoma upon the effect of their own code of procedure in reference to the action of Forcible Entry and Detainer, is of controlling force in this Court. Where that Court in construing this statute holds that remedy to be a mere action for possession based upon the immediate rights of the parties, and refuses to allow the defendant by his pleadings before the Justice of the Peace, to transform the action into a suit in equity, on his part, and thus oust the Justice of jurisdiction in the case, such holding is binding upon this Court, and proceedings in error thereon based should be dismissed upon motion.

In such proceedings in error, where the plaintiff relies upon the point that the Justice of the Peace erroneously refused to certify the cause to the District Court, under Section 4645 of the Oklahoma Code and by reason of such error all subsequent proceedings in the cause were void for want of jurisdiction, and it appears that the Oklahoma Supreme Court has uniformly held that said Section is not applicable in actions of Forcible Entry and Detainer, such construction is binding on this Court, and should not be reversed here.

Where, in such proceedings in error, the pleadings show that the title to the land in question is still in the United States and the matter still in fieri in the Land Department, and that the action is based upon the mere right of a homestead entryman to the possession of the land under the Homestead Laws, and the defence interposed is that the Land Department has mis-applied the law in a prior contest between the parties, and the defendant admits that he has no status other than that of a defeated claimant before the Land Department, the holding of the Oklahoma Courts to the effect that such defence does not amount to a question of title, within the purview of Section 4646 of the Oklahoma Code, limiting the Justice's jurisdiction, should be sustained.

Under the rule that the Department of the Interior has sole jurisdiction of the public domain so long as title remains in the United States, and the Courts will not interfere with its orders and decisions until title passes from the government, this Court should not pass upon the correctness of the Department's decision in a particular case, where the matter is still in fieri in the Department.

The action of Courts below in refusing to pass upon the legality of the Department's action while title was still in the government should be sustained.

That provision of the President's Proclamation of August 19, 1893, which set apart the hundred foot strip for the use of settlers at the opening of the Cherokee Outlet, should be construed so as to give full effect to the objects for which it was created and to reconcile the two clauses describing its location. A construction which ignores and entirely abandons the words "Around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," and defeats the object of the creation, by placing this strip remote from the eastern boundary of those lands upon a distant portion of the Osage Indian Reservation, should not be adopted.

That construction by the Land Department which reconciles those two clauses by giving the phrase, "Country known as the Cherokee Outlet" the same meaning as the words, "The entire tract to be opened to settlement," being a sensible construction in accordance with the common understanding of that phrase, and one which gives complete effect to the purposes for which that strip was created, should be sustained.

Such a construction by the Department charged with the primary enforcement of that law, having now stood for nearly ten years, should not be reversed unless shown to be manifestly incorrect.

ARGUMENT

On Motion to Dismiss in the Trial Court, and Motion to Dismiss Plaintiff-In-Error's Appeal.

Under the one heading of "Brief and Argument on Motion to Dismiss," Counsel for plaintiff in error has presented the questions of the jurisdiction of the Justice of the Peace and those presented by the motion to dismiss the appeal in this Court, without answering or discussing the authorities we have presented in support of that motion. So, we will now treat these questions together, although making but little reference to the latter motion.

We claim that the appeal in this Court should be dismissed because the title to the land in controversy is not involved; that the only question involved is the possession; and, that the possession not being shown to be worth the sum of Five Thousand Dollars, this Court has no jurisdiction to review the cause.

The action was possessory in its nature. In addition to the authorities cited by us in our brief heretofore filed on the motion to dismiss, we call the Court's attention to the following, from the Supreme Court of Kansas:—

"It has been expressly decided that the action of forcible entry and detainer is possessional merely,

and does not involve title to real estate, except to the extent that evidence of title may be incidentally shown to support the claim of right of possession."

Armour Packing Co. vs. Howe, 64 Pac. 42.

"The thing in dispute in forcible entry and detainer is not the title to real estate, but the mere right to its possession. In such class of actions the title to the real estate is not involved, but it is involved as an incident only, and not as the main subject of controversy:

McClain vs. Jones, 60 Kan. 639 (57 Pac. 500).

"An action for forcible detainer is a possessory action merely, and does not involve the title to real estate."

Wideman vs. Taylor, 65 Pac. 664.

If these declarations are the law, and we believe they are, all that is involved in this case is the possession of the land, and that not being worth five thousand dollars, this appeal should be dismissed.

These authorities just cited are in point against the motion of plaintiff in the District Court to dismiss the cause because the District Court had no jurisdiction thereof.

In the case of the Armour Packing Company vs. Howe (supra), the Supreme Court of Kansas held that the section of the code of that state (which is the same adopted into the Oklahoma code), providing that an action may be certified from the Justice of the Peace to the District Court, when it appears that title or boundary of land is in dispute, does not have ap-

plication to actions of forcible entry and detainer, (Section 4645 Okla. Code). In this case the Court also cites with approval the case of McDonald vs. Stiles, 7 Oklahoma 327, the syllabus of which reads as follows:

"The statute authorizing a Justice of the Peace to certify a case to the District Court for trial whenever the title or boundaries of real estate are put in issue, has no application to forcible entry or unlawful detainer proceedings, for the reason that title or boundaries cannot be put in issue in such proceedings.

The cases go so far as to hold that where a Justice of the Peace assumes to certify a forcible entry and detainer cause to the District Court, that the latter Court has no jurisdiction of the cause, and its judgment therein is consequently void.

If title to real estate is not an issue, and cannot be put in issue in a forcible entry and detainer proceedings, then manifestly, there was no error in the ruling of the District Court in denying counsel's motion to dismiss the proceeding on the ground that the Court had no jurisdiction of the cause.

The case of Yingling vs. Redwine by the Supreme Court of Oklahoma, cited by the opposing counsel, is not in conflict with the other decisions of that Court. The relations between the parties in that case were purely contractual, and the nature and validity of that contract was necessarily before the Court. There was no attempt to set up an outstanding title: there was

no cross-petition, as in all of the other cases we have cited. Moreover, all of the cases recognize that evidence of title is competent, for the purpose of showing the right of possession, or of showing the purpose with which an entry was made upon the land.

In the case of Conway vs. Gore, cited by counsel, from the Supreme Court of Kansas, it is distinctly stated as a general rule that "Title is not a matter of inquiry or defence in actions of forcible entry and detainer."

A title by which a party claims his right of possession is one thing; the contest over the validity of that title is entirely a different thing; the claim of the plaintiff in error in this case is based upon the assumption that they are one and the same thing. Because numerous cases have held that title may be offered in evidence as proof of plaintiff's right of possession in this class of cases, it is asserted that the inchoate right of a defeated homestead claimant, may be litigated in a forcible entry and detainer case arising in the justice court; that the mere allegation by defendant that the Land Department erred in applying the law in the contest case, where the title is still in the government, serves to oust the Justice of the Peace from jurisdiction to hear and determine plaintiff's cause.

All of the Kansas decisions construing this statute, and all of the Oklahoma decisions are

opposed to this theory. None of the Kansas cases cited by counsel are in point in this case. This is particularly true of those cases, in which he claims that a defeated homestead claimant, has defeated the action brought by his successful adversary, by an assertion of title growing out of facts which under the Land Department's holdings gave him no right to the land.

None of the Kansas cases cited were homestead cases, or grew out of facts similar to this case.

The case of Price vs. Olds (9 Kan. 66) and Alderman vs. Boeken (25 Kan. 658) while they grew out of forcible entry and detainer proceedings, arose upon contracts to purchase the land. The case of Duffy vs. Rafferty (15 Kan. 9) and Simpson vs. Boring (16 Kan. 248) were not even forcible entry or detainer proceedings; they were ejectment cases. The case of Mooney vs. Olsen (21 Kan. 697) was an action for rent.

We have been unable to find the case cited as Holland vs. Ess, and as being in 31 Kan. at page 88.

The case of Conway vs. Gore, we have already referred to.

Counsel has also cited the case of Langford vs. Monteith, (102 U. S. 145) which holds that, where in a civil suit before a Justice of the Peace of the Territory of Idaho, it appears by answer verified by affidavit, that the question of title is necessarily involved, the justice should certify the case to the District Court

for trial, and if he thereafter proceeds to try the cause, it must on appeal from his judgment, be dismissed. An examination of this case will show that the Court was giving effect to the construction placed upon the Idaho statute by the Idaho Supreme Court.

The Court said:—

"The judgment of the Supreme Court of Idaho, on the effect of their own code of proceedure in this respect, will not be reversed here."

But the construction placed upon that statute by the Idaho Court is not the construction which has been placed upon our statute by the Courts which have had to construe it.

Our statute is the Kansas statute adopted in this Territory in 1893.

The Supreme Court of Kansas in Duncan vs. Yordy, 27 Kansas 349, held that the mere filing of an answer stating that the boundaries of land are in dispute although verified as required by Section 7 of the civil procedure before justice, will not necessarily oust the justice of jurisdiction.

Under this decision upon the Kansas Code, the justice could proceed to try the case, notwithstanding the filing of such affidavit, and, unless it appeared at the trial that the boundaries or title to land were in dispute, judgment could be rendered upon the cause.

This construction, having been placed upon this

statute before its adoption into Oklahoma, was adopted as a part of the statute.

Willis vs. Eastern Trust and Banking Company, 169 U. S. 295—307.

And that being the law here, of course, it is immaterial what the law on the same question is in Idaho.

But that the Justice Court did have jurisdiction of this cause and, therefore, the cause should not have been dismissed on plaintiff in error's motion, for want of jurisdiction in the District Court, we consider as settled by the decision of this Court in Black vs. Jackson, 177 U. S. 349, which squarely holds that Jackson as entryman was entitled to bring his action of forcible entry and detainer.

We do not understand, however, that this case of Black vs. Jackson holds that Jackson was disqualified, or even may have been disqualified because he ran from the Chilocco Reservation.

The Court said:—

"No opinion was expressed on this question by the Supreme Court of the Territory, and we need not now express an opinion."

The Langford vs. Monteith case is also cited upon the proposition that this Court has jurisdiction of this cause by reason of the fact that the land is worth more than Five Thousand Dollars. That case does not show what amount was involved and does not show what

the value of the possession was. The case appears to have involved the occupancy of buildings and grounds under a lease and the question here presented seems not to have been raised or considered.

The case of the New Orleans Pacific Railway Co. vs. Parker, 143 U. S. 42, we consider has no bearing on this case. That was an appeal in equity to foreclose a mortgage on railroad land, and it appears that more than the jurisdictional amount was involved.

Counsel attempts to illustrate the alleged error of the Court by supposing the action of forcible entry and detainer was brought against one holding under an oral contract of sale and delivery of possession, by the holder of a subsequent deed from the same grantor, and citing authorities upon this supposed case.

We do not consider that this supposition illustrates anything pertinent to the cause at bar for the reason that Ida McClung did not possess this color of title, and, therefore, did not have the "color of title in equity" which the Court in the case of Alderman vs. Boeken, 25 Kansas 658, held was sufficient to defeat the action.

All the claim which Ida McClung has to this land, and with which she is attempting to defeat this action of forcible entry and detainer by the homestead entryman, is a claim of incohate right, the validity of which has been denied by the Interior Department, and that claim does not constitute title or color of

title or anything else that constitutes a defence to this action.

That the party who has been permitted by the Interior Department to place his homestead entry upon the land is the one who is entitled to the possession against the defeated entryman, and every other person claiming adversely to him under the homstead law, so long as the title remains in the government, would appear manifest. If this is not true then the Land Department may decide that one man is entitled to a homestead entry, while the Courts may step in and decide that another man is entitled to this entry, and thus give rights of possession in conflict with the decisions of the Interior Department, while the subject remains within its control.

That the successful contestant for the right to make homestead entry is entitled to the possession of the land, has been repeatedly affirmed by the Supreme Court of Oklahoma.

In the case of Brown vs. Hartshorn, 69 Pac. 1049, that Court said:—

"This Court has repeatedly held that where two parties have been claimants to a tract of public land and the adverse claims have been finally disposed of in the Land Department, and the successful claimant has been permitted to make homestead entry, such entryman then becomes entitled to the undisturbed possession of the tract as against the unsuccessful claimant, and such unsuccessful claimant, by refusing to vacate the land, and continuing to occupy the

same, becomes a trespasser, and his possession is wrongful; and the Courts will give effect to the decisions of the Land Department so long as the title is in the United States.

Woodruff vs. Wallace, 3 Okla. 355, 41 Pac. 357; Reaves vs. Oliver, 3 Okla. 62, 41 Pac. 353; Barnes vs. Newton, 5 Okla. 428, 48 Pac. 190, 49 Pac. 1074; Cox vs. Garrett, 7 Okla. 375, 54 Pac. 546; Calhoun vs. McCornack, 7 Okla. 347, 54 Pac. 493; Glover vs. Swartz, 8 Okla. 642, 58 Pac. 943; McDonald vs. Brady, 9 Okla. 660, 60 Pac. 509; Barnett vs. Ruyle, 9 Okla. 635, 60 Pac. 243.

We see no reason why one who has been determined by the proper tribunal rightfully entitled to the possession of a tract of public land should be forcibly kept out of possession by one who proposes at some future time to wage a suit against him to determine the correctness of such determination. Forcible de-detainer was the proper remedy in this action to determine the right to immediate possession. Nothing else was involved, and no other questions could be determined."

The Court in rendering this opinion understood that it was following the interpretation of our statute of forcible entry and detainer as placed upon it by the Supreme Court of Kansas, for it cited in this case the decision in McNamara vs. Culver, 26 Kan. 661; Conaway vs. Gore, 27 Kan. 122; McClain vs. Jones, 60 Kan. 639, and Armour Packing Co. vs. Howe, 62 Kan. 587, 64 Pac. 42.

This case follows the case of McQuiston vs. Walton, decided by the Supreme Court of Oklahoma at the same time, and there has been numerous decisions to

the same effect of more recent date.

The latest reported case is that of Anderson vs. Ferguson, 71 Pac. 225, which holds:—

"An action of unlawful and forcible detainer is purely a proceeding at law and does not, and cannot, involve the exercise of equitable jurisdiction, the right to the possession being the sole question involved. Questions other than the immediate rights of the parties cannot be litigated in such actions." (Syllabus prepared by the Court.)

It is quite useless for counsel to assert that his client raised a question of title by her pleadings in the trial Court. The facts which he there pleaded do not amount to even *color of title*.

Many authorities might be cited upon this proposition, but we shall be content to show that such is the rule prevailing in the Oklahoma Courts, which rule has the express sanction of this Court.

In the case of Black vs. Jackson, 177 U. S. 349, we find the following direct statement of this matter:—

"And we cannot find that the Court has in any case withdrawn or qualified the ruling that an entryman out of possession, and having a decision by the Land Office in his favor, may proceed against his adversary in possession by an action of forcible detainer, and thus obtain possession without resorting to the extraordinary remedies used by a Court of Equity. According to the decisions of that Court, Black as between himself and his successful adversary *was in possession, without color of title*. Now by the statutes of the Territory in the article relating to forci-

ble entry and detainer, if it be found that lands and tenements after a lawful entry 'are held unlawfully' then the Justice 'shall cause the party complaining to have restitution thereof,' and it is provided that proceedings under that article may be had 'in all cases where the defendant is a settler or occupier of lands and tenements without color of title, and to which the complainant has the right of possession.'" (The italics are ours.)

The Court not only finds that the facts pleaded by Black do not amount to color of title under the holding of the Supreme Court of Oklahoma, but gives its express sanction to that holding by asserting that Jackson had an adequate remedy at law under that provision of the forcible entry and detainer statute relating to "settlers or occupiers of lands and tenements without color of title."

Under the rule of the Territorial Court, thus expressly sanctioned by this Court, the facts pleaded by Mrs. McClung do not amount to even color of title.

In the face of that settled rule of law, it is manifestly impossible for her counsel to maintain that the pleadings in the trial Court raised a question of title, so as to defeat the jurisdiction of the Justice of the Peace. Pleadings which do not set forth facts showing color of title in the defendant in this class of cases, cannot be held to raise a question of title, within the purview of the statute which prohibits Justices of the Peace from trying cases involving title or boundaries of real estate.

Counsel's sweeping assumption that the facts pleaded in the trial Court do raise a question of title, such as to either oust the justice of jurisdiction, or require him to certify the cause to the District Court is, therefore, wholly without foundation. Those pleadings set forth precisely the same facts as Black set forth in the case last cited. This Court has held that such a state of facts as Black presented does not amount to color of title.

Moreover, it is clear from the record that no question of title could be raised in these pleadings. The admitted status of this tract will suffice to show that no question of title could be raised.

This tract is a part of the public domain. The government had in no wise parted with either the legal or equitable title thereto, when this action was commenced. Neither McClung nor Penny had ever attempted to make final proof. Neither of them had ever had any title therein. Penny as the successful contestant had only gone so far as to perfect his homestead entry. The entire matter was still *in fieri* in the Land Department. Penny was required to reside upon the land, cultivate and improve it, before he would be in position to submit final proof. His rights were conditional and inchoate, and might never ripen into any form of title. Jurisdiction of the tract, and case, was still vested exclusively in the

Department. Mrs. McClung was, as we have shown, "a settler or occupier without color of title." The only tribunal having jurisdiction had passed upon her claim to the land, and cancelled it.

She was in possession of all the land when the case was commenced. Penny was forced to resort to the local courts to enforce his right of possession, and place himself in position to cultivate and improve the tract as required by law. He merely asked the local courts to give effect to the judgment of the Land Department, to the extent of placing him as the successful claimant in possession of his land, so that he might comply with the law and earn his title thereto.

That the local courts should under such circumstances afford a summary and speedy remedy to the rightful claimant, as against one who is a mere trespasser and seeks to exclude him from possession of any part of his homestead, is conceded by all courts. In the case of Black vs. Jackson, this Court held that while mandatory injunction was not a proper remedy, forcible entry and detainer was applicable to this class of cases, and would afford a speedy and adequate remedy.

This is an important question of practice that affects many cases in this Territory. Immediately upon the rendition of the decision in Black vs. Jackson, scores of parties commenced their actions under this

statute. They have relied upon the holding that forcible entry and detainer was the proper remedy in this class of cases. In line with this Court's holding in that case, the District Courts, and the Supreme Court of Oklahoma, have in scores, if not hundreds of cases held that this action would lie.

Should it now be held that the action can be defeated by appearing before the justice and setting up some alleged error of law in the Department's decision —should it be held that such a plea raises a question of title that will oust the justice from jurisdiction, then this remedy fails as well as that of mandatory injunction. If such a plea does raise a question of title, then the justice cannot under our organic act, try the case, for he has no jurisdiction. On the other hand, he cannot certify the case to the District Court, for both the Kansas Courts, and our own Territorial Courts, have expressly held that the clause providing for certification, does not apply in forcible entry and detainer cases. The District Court cannot acquire jurisdiction in that manner. (See McDonald vs. Stiles, supra). The Justice Court alone has original jurisdiction. The action of forcible entry and detainer cannot, under the Oklahoma Statute be brought in any other court.

At the time the litigation in this case was waged in the Justice Court, and in the District Court, and when Plaintiff in Error here was attempting to present

her so-called title, that is the assertion of her incohate right of homestead entry, which had been denied by the Land Department, the title to this land was in the government, and Penny had the mere right and status of an entryman under the homestead laws. In this situation under the decisions of this Court the decision of the Interior Department could not be challenged. It has been repeatedly held by this Court that so long as the title remains in the United States the courts have no jurisdiction, and will not interfere with departmental decisions, concerning the disposition of the public domain.

In the case of Johnson vs. Towsley, 13 Wallace 72, which is the leading case on the subject, this Court speaking by Mr. Justice Miller, said:

"This Court has at all times been careful to guard itself against an invasion of the function confided by law to other departments of the government, and in reference to the proceedings before the officers intrusted with the charge of selling the public lands it has frequently and firmly refused to interfere with them in the discharge of their duties, either by mandamus or injunction, so long as the title remained in the United States and the matter was rightfully before those officers for decision. On the other hand, it has constantly asserted the right of the proper courts to inquire, after the title had passed from the government, and the question became one of private right, whether, according to the established rules of equity and the acts of Congress concerning the public lands, the party holding that title should hold absolutely as his own, or as trustee for another. And we are satis-

fied that the relations thus established between the courts and the Land Department are not only founded on a just view of the duties and powers of each, but are essential to the ends of justice and to a sound administration of the law."

In the case of Moore vs. Robbins, 96 U. S. 530, the Court said:—

"But in all this there is no place for the further control of the Executive Department over the title. The functions of that department necessarily cease when the title has passed from the government. And the title does so pass in every instance where, under the decisions of the officers having authority in the matter, a conveyance, generally called a patent, has been signed by the President, and sealed and delivered to and accepted by the grantee."

This doctrine of non-interference of the courts with the decisions of the Interior Department until the title had so far passed that the land had become the subject of private ownership, is expressly declared in the case of Wilburn vs. Baldwin, 5 Oklahoma 265.

Under these decisions the correctness of the determinations upon this contest made by the Land Department could not be questioned until Penny made final proof and received his final or patent receipt for this land, and this being true the question could not be litigated in this cause, even if it were true that title may be tried in an action brought as a forcible entry and detainer proceeding.

Under the Kansas and Oklahoma decisions title

may be incidentally involved in such a cause. In the case of Brown vs. Hartshorn (supra), the Court said:

"It has been repeatedly held that the action of forcible detainer as provided by our statute, is purely a possessory action, and that questions of title or right to title cannot be determined in such actions. If title is involved, it is only as an incident, and may be inquired into, for the purpose of determining who has the right to possession."

This being true, if the theory of the counsel for plaintiff in error is correct that they have in this form of action a right to challenge the correctness of the decision of the Land Department concerning the rights of these parties to this land, it does not follow that the cause should have been dismissed in the District Court upon the motion urged by counsel here, but the Court should then have considered the question whether this claim of Mrs. McClung was sufficient to entitle her, instead of Penny, to the possession of this land. If the Court should take this view of the case then it would become important to consider the cause upon the merits of the claim of plaintiff in error that the Land Department erred in awarding this land to Penny, and this brings us to the merits of that question.

ARGUMENT ON MERITS.

The question attempted to be presented by the answer in the Justice Court filed by Ida McClung is:—Did the Land Department err in its decision holding that William A. Penny was the first settler upon this tract of land and a qualified homestead entryman? That he was the first settler is not controverted by plaintiff in error, but it is asserted that he was prohibited from making the run into the lands opened by the Proclamation of the President of the United States of date August 19th, 1893, from the Osage Reservation. It is claimed that the one hundred foot strip of land around the Cherokee Outlet that was opened to settlement September 16th, 1893, was on the 96th Meridian, the east line of the Osage Indian Reservation. No Court or Land Department has ever sustained this claim of counsel.

The decision of the Secretary of the Interior in the case of Cagle vs. Mendenhall, 20 L. D. 466, cited by counsel, was expressly overruled in the case of Brady vs. Williams, 23 L. D. 553, and subsequently that decision was recalled and the land awarded to Cagle. In that one case, however, which is the only solace or consolation of the anti-reservation runners, the secretary denies the only proposition which could ever give any foundation to the conclusion reached in that case and held that the one hundred foot strip

was on the eastern border of the Cherokee Outlet as we claim it to be, that is, of the land that was opened to settlement, and based the decision on the instructions of the Department, "to remove all persons from the one hundred foot strip on the eastern boundary," and upon the instructions to the special agent in answer to the inquiry, "whether persons would have the right to make the run from the eastern border of the tract," and the secretary concluded:—

"I am satisfied that the action of the department in forbidding persons from making the run from any of the reservations on the eastern border of the 'outlet' was not inconsistent with the Act of Congress."

So even that decision of the Secretary, long since overruled, and which is the only support for the claim of plaintiff in error, disputed the principle upon which the claim of plaintiff in error is based, by holding that the one hundred foot strip was on the eastern boundary of the country that was being opened to settlement.

The decision that settlers entering from the Osage and other reservations adjacent to the lands that were being opened to settlement were disqualified because they had crossed or gone upon Indian lands, was so untenable that this argument is no longer made, but resort is had to this one decision of erroneous conclusion upon which to base the claim of disqualification.

If a settler or runner could not have entered from the Osage Reservation, he could not for the same reason have entered from a one hundred foot strip on the east line of that reservation, and could not, for the same reason, have entered from the Cherokee Reservation, therefore, he could not have entered from the east side at all, because the east side of the Cherokee Outlet was entirely bordered by Indian reservations.

The President's Proclamation, however, said:—

"A strip of land one hundred feet in width, around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, viz:

Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be open to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation."

The language is clear and unambiguous. It temporarily reserved a strip of land one hundred feet wide for the occupation of the intending settler, and within which he might not go, but anywhere upon which, or outside of which, he might make the run on the opening day.

That language is not ambiguous and, therefore, is not subject to construction. For language which is

clear needs no construction and, if it need none, it can not be construed.

Yerk vs. United States, 173 U. S. 439.

To place the one hundred foot strip on the 96th meridian would nullify the words "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," for the reason that the Osage reservation was not within the outer boundary of any tract of country that was opened to settlement, and if the Osage and other reservations were not included within the tract, then, the entire tract was not being opened to settlement. Such a construction would absolutely nullify this clause of the President's Proclamation. And it is one of the canons of construction that Acts of the Legislature shall be so construed that one section will not defeat or destroy another but explain and support it.

Bernier vs. Bernier, 147 United States, 242.

The purpose of the President in providing the one hundred foot strip for the occupancy of intending settlers was to aid and facilitate the opening of this new country and the purpose of those intending to make entry thereon by providing a place immediately adjacent to the land to be settled and entirely around the entire tract to be settled, upon which no person could disturb or molest the settler or claim he had no right to be. The construction now sought to be placed upon this proclamation by counsel for plaintiff

in error would absolutely defeat this purpose because it would place this one hundred foot strip on the east side of the tract, many miles away, instead of "immediately within the outer boundaries" thereof. And it it another canon of construction that statutes must receive such an interpretation as will effectuate the legislative intention, and, if possible, avoid an unjust and absurd conclusion.

Law Ow Bew vs. United States, 144 U. S. 47.

The President's Proclamation prohibited entry before the hour of the opening only upon the land to be opened to settlement. It stated: "Said land so to be opened as herein proclaimed shall be entered upon and occupied only in the manner," etc., and these lands that were being opened to settlement were the lands which the Act opening said lands had declared to be a part of the public domain. This Act of March 3rd, 1893, (Statutes U. S. at Large, Vol., 27, p. 642), provided:—

"Said lands, except the portion to be allotted as provided in said agreement, shall, upon the payment of two hundred and ninety-five thousand seven hundred and thirty-six dollars, herein appropriated, to be immediately paid, become and be taken to be and treated as a part of the public domain."

So that the "said lands," referred to in this Act of Congress and President's Proclamation, opening these lands to settlement and which were to be entered from the one hundred foot strip were the

lands that were declared to be "a part of the public domain."

Now, if the Osage Reservation was "a part of the public domain" on September 16th, 1893, then it was a part of the lands which the President designated as "the country known as the Cherokee Outlet" and was opened to settlement. No one will claim that these conditions existed. The Osage Reservation was not opened to settlement and it was not, and is not, a part of the public domain. Therefore, it did not come within the designation of "said lands" in the Act of March 3, 1893, or "Said lands to be opened as herein proclaimed" in the President's Proclamation. Therefore, the Osage Reservation was not a part of "the entire tract of country to be opened to settlement" around which the one hundred foot strip was located.

The Osage Reservation was not a part of the "Country known as the Cherokee Outlet" by the President and people of the United States on August 16th, 1893, when this Proclamation was promulgated. This designation of land by the President was in common terms, such as were meant to be and could be understood by all the people without reference to any legal definition or technical boundaries. "The country known as the Cherokee Outlet" embraced a tract of country that was known, not technically, but generally, by the great body of population that constituted American citizenship at that time. It was the coun-

try that the homeseekers, as the President well knew, had been looking to for years. It was a country not occupied, owned or possessed by Indians or Indian tribes, but that country that was commonly called, and commonly "known as the Cherokee Outlet" and to which the Indian title had then been extinguished and which was open to homestead settlement.

The Osage Reservation was no more a part of the Cherokee Outlet at that time than old Oklahoma was a part of the Muskogee or Creek Country after the Act opening it to settlement.

By the treaties by which "old Oklahoma" was acquired from the Creek Indians and opened to settlement under the Act of March 2nd, 1899, that country forever ceased to be a part of the Creek or Muskogee lands, and by the treaties under which the Osage Indians acquired their reservation on the Cherokee Outlet, the lands of the Osages forever ceased to be a part of the Cherokee Outlet, and it was evidently the intention of the President when he was describing in his Proclamation a tract of country thereby to be thrown open to settlement on September 16th, 1893, to designate a tract of country that was then at that time, at that very hour, "known as the Cherokee Outlet."

The lands of the Osages taken out of the old Cherokee Outlet were no more a part of the country

at that time "known as the Cherokee Outlet" than the reservation of the Osages on the north of that outlet and in the State of Kansas, and which they had long since ceded to the United States Government, was a part of that outlet.

The terms "Known as the Cherokee Outlet," used by the President in describing the country around which the one hundred foot strip was placed are the same terms as those used in the Organic Act of Oklahoma in describing that portion of the Cherokee lands which was left after the boundaries of Oklahoma Territory had been drawn around the reservations in the eastern portion of the old Cherokee Outlet. Congress, in Section 1, of the Organic Act, after describing and defining the boundaries of Oklahoma Territory, said:—

"Whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extinguished and the President shall make Proclamation thereof, said Outlet shall thereupon and without further legislation become a part of the Territory of Oklahoma."

In the case of the United States vs. Pridgeon, 153 U. S. 48, the Supreme Court of the United States, in considering the question whether this land known as the Cherokee Outlet was or was not a part of the Territory of Oklahoma, said:—

"The boundaries of Oklahoma Territory as defined by the Act of May 2nd, 1890, creating a tempo-

rary government therefor, did not include the Cherokee Outlet."

That declaration was made concerning that country which the President described in the Proclamation as the "Country known as the Cherokee Outlet." Thus, ever since the passage of the Organic Act placing the Indian reservations on the eastern border of the ancient Cherokee Outlet, within the Territory of Oklahoma, the legislative, executive and judicial branches of the government have all understood and referred to the country "Known as the Cherokee Outlet" as being the country west of the Indian reservations on the Old Cherokee Outlet, and which were not opened to settlement by the President's Proclamation, of August 19th, 1893.

No other construction can be placed upon these Acts of Congress, the President's Proclamation and the decision in the Pridgeon case. And these constructions, by parity of reasoning, must place this one hundred foot strip on the eastern border of the lands known as the Cherokee Outlet, west of the Osage, Ponca and other Indian reservations. Thus the one hundred foot strip has uniformly been placed by the branch of the government which was vested by Congress with the authority to administer this Act of Congress opening these lands to settlement. And this construction should not only be received with great weight by this Court, but having been adhered to in

the disposition of these lands for a period of almost ten years, should now be considered as decisive of this suit.

United States vs. The State Bank of North Carolina, 6 Peters 29.

United States vs. Moore, 95 U. S., p. 760.

United States vs. Johnson, 124 U. S., p. 236.

Pennoyer vs. McConnaughy, 140 U. S., p. 1.

United States vs. Alabama, etc., Ry. Co., 142 U. S., p. 615.

Counsel claims that all the lands west of the 96th meridian were the lands referred to in the President's Proclamation, as the "Country known as the Cherokee Outlet" and were all opened to settlement except the land reserved therein.

When the reservations of the Ponca and Osage Indians were made they lost their identity as a part of the Cherokee Outlet, and became reservations of those tribes and have ever since been so known and designated. And ever since the passage of the Organic Act of Oklahoma they have been separate and distinct bodies of land from that "land known as the Cherokee Outlet" referred to in Section 1, of the Organic Act.

Would the Ponca, Otoe, the Missouri, Osage and Kansas Indian lands have been opened to settlement by the Proclamation of President Cleveland declaring that the "country known as the Cherokee Outlet" was

opened to settlement if he failed to expressly exclude these Indian reservations from the operation of the Proclamation opening these lands to settlement? Certainly not. There was no law providing for opening those lands to settlement. They were, and are, no more open to settlement than the lands of the Cherokee Indians on the east of the Osage Reservation, and there could have been no more reason for requiring the intending settler to run from the east side of the Osage Reservation than there would have been to have required him to have run from the east side of the Cherokee Nation.

It is significant that the President did not use the terms referred to in that part of the Proclamation reserving from settlement the Indian Reservations of the Osage and other Indians, the Cherokee title to which, if any there was, was extinguished in the purchase by treaty from the Cherokee, Tonkawa and Pawnee Indians, approved by Act of March 2nd, 1893, but that he did use these terms only in referring to the "said lands to be opened" to settlement.

None of these terms, on which counsel now lays so much stress, are used in that part of the Proclamation describing the reservations therein cited, and the reading of the entire list of reservations would not have disclosed that they ever were in the Cherokee Outlet by name, and it remained for the President to use

these terms, with reference to the country with which he was dealing, after the reservations in the Proclamation had been made. He had, in the course of his Proclamation, recited the previous Acts of Congress ratifying the Indian treaties, and the Acts otherwise referred to in the Act of March 3rd, 1893, and had defined the boundaries of the countries, and had specifically recited the lands under the several agreements therein referred to which were not to be opened to settlement; and he then began his declarations of the terms and conditions upon which the "said lands to be open" to settlement might be entered upon and occupied, and it was with reference to the "lands to be opened" to settlement that the President, for the first and last time in the Proclamation, used the expresssion, "Country known as the Cherokee Outlet." He evidently used this as a general term to designate the lands opened to settlement, and not as a description of the country he had just dealt with which was not open to settlement.

Official maps prepared by the government showed this portion of the Cherokee lands lying west of these reservations as the "Cherokee Outlet." When the Proclamation was prepared there accompanied it a map showing the lands opened to settlement. Upon this map showing the lands to be opened to settlement, and published for general distribution before the opening, the term "Cherokee Outlet" is used as

applied to these lands, and not to the entire tract west of the 96th meridian.

The newspapers for many months had teemed with news concerning this opening. In every corner of our land it was discussed with eager interest and expectation. Every paper, every person, spoke of it as the "Opening of the Cherokee Outlet." The lands then opened were commonly known to all as the "Cherokee Outlet."

Knowing that such was the popular designation of this opening, the President used the phrase "Country known as the Cherokee Outlet," as a general term for the lands to be opened to settlement.

Counsel claims that in all Acts and Proclamations referring to this country it was referred to as "the Country known as the Cherokee Outlet." This is a mistake. Those terms are not used in the Act of Congress opening the country to settlement, or in any Act of Congress excepting the Act of May 2d, 1890, the Organic Act of Oklahoma, which we have before seen, referred to that part of the old Cherokee Outlet west of all these Indian reservations which were not open to settlement. These exact terms, "Country known as the Cherokee Outlet," were never used in any Act of Congress. The designation in the Oklahoma Organic Act was "Land known as the Cherokee Outlet," which of course meant the same thing as the President was referring to when he said "Country known

as the Cherokee Outlet." The term used in the Act opening this country was simply "Cherokee Outlet." The President carefully avoided using that term in designating the country to be opened to settlement, and used without quotation, the term "Country known as the Cherokee Outlet," as, indeed, it was known by all intending settlers.

The prohibition contained in the Act of Congress that "No person shall be permitted to occupy or enter upon any of the lands herein referred to except in the manner prescribed by the Proclamation of the President opening the same to settlement, and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands," lends no assistance in determining where the one hundred foot strip was from which, or from beyond which, manifestly, any settler could run into the country to be open to settlement. That provision did not declare that no person could run from any point west of the 96th meridian, or from any of the Indian reservations, which had been located upon the old Cherokee Outlet. It only prohibited the entry in any other manner than as prescribed by the Proclamation.

None of the languageof Mr. Justice Brewer, contained in the decision of Smith vs. Townsend, 148 U. S. 490, is susceptible of the construction that the Act of March 2nd, 1889, was intended to prohibit settlers from entering any of the lands west of the 96th merid-

ian that might thereafter be opened to settlement from a point west of that line. It was not in that decision, or any other decision, ever declared that the settlers entering Old Oklahoma could not make the run from the Iowa and Sac and Fox country, both of which were east of Old Oklahoma and west of the 96th meridian. Both of those reservations were a part of the "entire territory" west of the 96th meridian, but in all of the decisions which have finally controlled the disposition of lands in Oklahoma, and which have referred to the question, it has been held sufficient that the settler was not within the outer boundaries of the particular territory that was being at that time open to settlement.

The wall, described in Smith vs. Townsend, around the territory to be opened to settlement was a wall around old Oklahoma, and not a wall around all of the country referred to in Section 14, of the Act of March 2nd, 1889.

Counsel misconstrues the language of Mr. Justice Brewer, in Smith vs. Townsend, to mean that the "wall" therein spoken of was intended by Congress to be placed around the entire territory mentioned in Section 14 of the Act of March 2nd, 1889, that is, all of the Indian land west of the 96th meridian, Such a declaration is not made, or intended to be made, in this decision. It is therein stated:—

"The evident intent of Congress was, by this leg-

islation, to put a wall around this entire territory, and to disqualify from the right to acquire, under the homestead laws, any tract within its limits, everyone who was not outside of the wall on April 22nd." And,

"But if at the hour of noon on April 22nd, when the legal barrier was by the President destroyed, he was in fact outside of the limits of the territory." And,

"For it is obvious that, when a railroad runs through unoccupied territory like Oklahoma, which on a given day is open for settlement, numbers of settlers will immediately pour into it, and large cities will shortly grow up along the line of the territory."

These various expressions show that the writer of this decision, and this Court, referred to "this entire territory" and "the limits of the territory" as being the "unoccupied territory" * * * opened for settlement," and not all of the Indian Reservations referred to in the Act of March 2nd, 1889.

This is made clear also by considering the declaration which the court makes of the intent of the Act of Congress, in the following language:—

"It would destroy absolutely that equality which was evidently the intent of Congress in the legislation."

It was that equality which was the purpose and object of the President in fixing the one hundred foot strip around the land to be opened to settlement within which no settler might enter until the hour of the opening. What equality would there be in placing that one hundred foot strip on the outer boundary of

the land to be opened to settlement on three sides thereof, and from twelve to fifty miles away from that outer boundary on the other side thereof? The Proclamation would thus become an instrument of inequality instead of one of equality, because those entering from three sides of the tract, after leaving the one hundred foot strip would immediately go upon the opened lands, while those entering from the other side thereof would have to run from twelve to fifty miles before they could gain the privilege which those entering from the other three sides would gain immediately. There certainly would be no equality in this.

But, this one hundred foot strip was upon land opened to settlement, for the Proclamation in immediate connection with the provision with relation to the one hundred foot strip said:—

"Such occupancy shall not be regarded as trespass or a violation of this Proclamation, or of any law under which it is made, nor shall any settlement rights be gained thereby."

The use of that language shows that the President understood, in framing the Proclamation, that the one hundred foot strip was "around and immediately within the outer boundaries of the entire tract of country to be opened to settlement," and that the one hundred foot strip was upon the same kind of land throughout, and that this one hundred foot strip was upon the land that was opened to settlement, and so he declared, "Nor shall any settlement rights be

gained thereby."

What settlement right could have been gained on the Osage and Kaw Reservations, were this strip located along the south, east and north sides of the Osage Reservation and the north side of the Kaw Reservation, as would be the case if the position of plaintiff in error in this case is sound? Certainly none.

As those Reservations were not opened to settlement, if the President had understood in this Proclamation that he was putting the one hundred foot strip upon the Kaw and Osage Reservations, and not upon the border of the lands opened, he would evidently have stated that such occupancy, where the same was made upon lands being opened to settlement, should not be regarded as a trespass, and that no settlement right should be acquired upon the opened lands, and that the settler should not be permitted to remain upon the Indian lands longer than until Twelve o'clock, noon, September 16th, 1893, when the settlers right to occupy the Indian land, if that was the intent of the President, should be declared ceased.

But the President was not speaking or intending to speak of a trespass upon Indian lands.

The President himself was a trespasser upon Indian lands, if this Proclamation means what counsel says it does, for the President had no right to occupy or to permit the occupancy of this one hundred foot strip upon Osage and Kaw Indian Reservation lands.

The Act opening the Cherokee Outlet to settlement gave the President no right to permit the occupancy for a period of twenty-eight days of these Osage and Kaw Reservation lands, and the one hundred foot strip was placed on the eastern border of the lands to be opened to settlement as well as upon the other borders, so that the intending settlers might go to such one hundred foot strip and occupy that ground without being trespassers either upon Indian lands or upon the lands opened to settlement.

The canon of statutory construction, that a word or expression repeatedly used in a statute will bear the same meaning throughout the statute, unless a different intention appears, renders no assistance or aid to the determination of the question as to where the one hundred foot strip was located, for the expression, "Country known as the Cherokee Outlet" is used but once in the Proclamation and is not used in the Act which called forth the Proclamation, and the terms "Cherokee Outlet" and "Country known as the Cherokee Outlet," are not the same expressions. Both of these terms are used once in the Proclamation. The latter term is not used at all in the Act, and these terms in the Proclamation, as well as one of them in the Act, were not intended to refer to the Outlet in the same way. The term "Cherokee Outlet" is used in quotation both in the Act and Proclamation and meant to refer to the Outlet as

designated in former executive orders, while the "Country known as the Cherokee Outlet" was intended to refer to the "Cherokee Outlet" as it was commonly known throughout the country as the country being opened to settlement under the Proclamation.

This construction of the meaning of the terms "Cherokee Outlet" and the "Land" or "Country known as the Cherokee Outlet" is illustrated by the difference in the expressions, without quotation, in the first section of the Organic Act of Oklahoma, in which the terms "Except the unoccupied part of the Cherokee Outlet" and "Land known as the Cherokee Outlet" are used.

In the first portion of the section Congress declared that the Territory of Oklahoma was being formed, of all the Indian Territory, except the lands of certain tribes and "except the unoccupied part of the Cherokee Outlet," and, after having then specifically defined the boundaries of the Territory of Oklahoma, Congress proceeded to declare that "Whenever the interest of the Cherokee Indians in the land known as the Cherokee Outlet shall have been extinguished, etc.," said land should become a part of the Territory of Oklahoma.

Counsel, we think, is also mistaken in the interpretation of the decision of the Secretary in the case in Brady vs. Williams, to mean that the country known as the Cherokee Outlet was bounded on the

east by the Arkansas river. There, after quoting the language of the Proclamation referring to the location of the one hundred foot strip and giving the purpose of the President in making this reservation, the secretary says:—

"To avoid these complications the President made this reservation to enable all intending to enter lands, to congregate on this strip and thereby get an even start."

The Arkansas River only partly represented the east line. The Arkansas River was east of the country being opened to settlement, where that line did not touch the Ponca, Otoe and Missouri Reservations.

The characterization by counsel in the Court below of the very many persons who entered the Outlet from the Indian Reservations, as "25 or 30 who stole into the country in the night time despite the efforts of the soldiers to keep them out," is absolutely incorrect, and entirely unsupported by any allegation of the petition or any finding of the Interior Department. It is an attempt to prejudice this Court against a class of people who have never by any branch of the government been held to have crossed the one hundred foot strip around the "country known as the Cherokee Outlet" before twelve o'clock Noon, September 16th, 1893.

There is nothing in the findings in this case to

show whether the One Hundred and Fifty Thousand people, which counsel speaks of in his brief, were located on the east side of the country to be opened, or on the north or south boundary and we know of no decision which holds that there were any particular number located on the east, north, south or west sides of this country and made the run from there.

The provision locating the one hundred foot strip was one which sought to give an equal advantage to all persons, and each and every person had an absolute right to enter this country from any side thereof which he pleased, and the fact, if it existed, that more or less people congregated at any particular place, or any particular border, is no argument whatever in favor of declaring the Proclamation to be something else than its interpretation bears. To establish an even or an unbroken border, was not the purpose of the President in locating the one hundred foot strip. That purpose was, as the Department of the Interior has repeatedly declared, to give all persons intending to enter the strip an opportunity to "get an even start." An unbroken border on the east side would not give this equality, while a broken border would, because the broken border was the contour of the country.

The geographical certainty was just as great upon the broken or uneven border as it would have been upon the unbroken. In fact, much greater. The

people knew, generally, where the border of the country to be opened to settlement was, because that was the land they were after. They would probably have had much more difficulty in finding the east line of the Osage Country, which was not a subject of inquiry, which was not a place that anybody at that time wanted to go to, than they had in finding the eastern border of the country to be opened to settlement and which many persons did want to go to, did go to, found, and entered upon, and from which they have created farms and established homes and are providing for and rearing their families, and these conditions, we believe, are based upon a fair and proper interpretation by the Secretary of the Interior of the law opening the country, and the President's Proclamation should not now be disturbed.

The case of Decker vs. The A. T. & S. F. R. R. Co., 3 Okla. 553, renders no assistance to either side of this case. It in no way defines or mentions the one hundred foot strip, and has no relation to the question as to where the intending settler could enter the country from, on its eastern border.

Counsel claims that the Osage Reservation was a part of the entire body of land opened to settlement, and was reserved from being opened to settlement in the same manner that lands for educational and military and townsite purposes were, by the President, reserved. Is this true? Suppose the President had

not reserved Sections Thirteen and Thirty-three, would they have been reserved from the settlement which was allowed upon this entire tract of land? We say, no: they would have gone to the settler with the other section. Suppose the President had not reserved the Osage Reservation, would it have gone to the settler for his occupancy as a homestead? Could the settler, then, or any day from September 16th, 1893, till now, have settled on a foot of the Osage lands as a homestead? We say, no; because the President had no authority to open said lands for settlement. This is the difference between settlement upon the land in the "Country known as the Cherokee Outlet," and upon the land of the Osages, and shows that there is no similarity whatever between the two cases.

Counsel claims that, if it had been intended that settlers should run from the reservations on the east side of the lands that were open to settlement, booths would have been placed there for registration, and, as no such booths were placed there, it is an argument in support of the conclusion that it was the intention that settlers could not run from that side. But the President said that the settlers could run from all sides. Furthermore, there was a one hundred foot strip on the east side of this promised land that was being opened to settlement, because the President said that the one hundred foot strip was "around"

"* * * the entire tract to be opened to settlement," and it could not have been around without being somewhere on the east side. If there had been a booth placed on the 96th meridian, there would be something in this argument of counsel, but as there was no booth anywhere on the east line, no inference can be drawn from this fact, as to where the reserved strip was located. Again, if it required a booth to locate the one hundred foot strip, and, if the one hundred foot strip was not along the west side of the Osage and Ponca Reservations because there was no booth, then there was no one hundred foot strip on the west line of the Outlet because there was no booth located on the western side.

The Proclamation of the President located all the booths on the north and south lines of the land to be opened to settlement. But he at the same time said that this one hundred foot strip from which and over which the settler might run at Twelve o'clock, Noon, Central Standard Time, September 16th, 1893, was located "around and immediately within the outer *boundaries* of the entire tract to be opened to settlement. This means all the boundaries, not part of them.

Manifestly, there is nothing in the booth argument.

The questions in this case are very similar to those we now submit in the case of Winebrenner vs. Forney.

Forney ran from the Ponca Indian Reservation, while this case shows, and the Secretary found, that Penny ran from a point east of the Arkansas River in the Osage Reservation. These cases are now presented by the same counsel, and the principles governing the two cases are nearly the same. We, therefore, ask that the Court, in considering this case, also, take and consider as a part of this brief, the brief filed by us for defendant in error on behalf of Edward C. Forney in the Winebrenner-Forney case, and, in order to save repeating our argument at great length here, we make our said brief a part of this brief.

We very respectfully ask that the judgment herein be affirmed.

FRANK DALE,
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C. W. RANSOM,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 384.—October Term, 1902.

Ida McClung, Plaintiff in Error, vs. William A. Penny. } In error to the Supreme Court of the Territory of Oklahoma.

[April 6, 1903.]

This was an action of forcible entry and detainer, commenced by Penny, the defendant in error, in the Probate Court of Kay County, Oklahoma Territory, a court adjudged by the Supreme Court of the Territory to have jurisdiction in such actions by virtue of sec. 4805, art. 13, chap. 67, and sec. 1562, art. 15, chap. 18, Rev. Stat. 1893. A judgment for the plaintiff was affirmed by the Supreme Court of the Territory, (69 Pac. Rep. 499,) and thereupon the case was brought here on a writ of error. The testimony on the trial developed these facts: The parties contested in the land department the right to enter the tract in controversy as a homestead. The plaintiff's contention was sustained, and he was permitted to make entry. Having received the homestead certificate, he commenced this action.

Mr. Justice Brewer delivered the opinion of the Court.

The defendant in error has filed a motion to dismiss the writ of error for want of jurisdiction, on the ground that the value of the matter in controversy does not exceed $5,000, and in support thereof has filed the affidavits of himself and five others that the reasonable rental value of the land is not more $620 per annum. The plaintiff in error contends that the matter in dispute is in fact not the possession of the land but the ownership, and at the time the writ of error was allowed he filed the affidavits of four persons, one his counsel, who testified that the action involved both the possession and the ownership of the lands, that the matter in controversy exceeded in value the sum of $6,000, that the value consisted in the right of possession and power to relinquish to the government the homestead entry; the others, who stated that the value of such relinquishment was $8,000 or $8,500. The record shows that in the answer was this averment: "That said land with the improvements of the defendant thereon is reasonably worth and the relinquishment thereof could be sold for the sum of $5,000; that this defendant demands the right to remain in possession of said land by virtue of her vested interest therein, and as against

the claims of said plaintiff under his void and unlawful homestead entry, in order to protect the limited title which defendant has acquired in said land, and to acquire a perfect legal title therein, under and by virtue of the laws of the United States;" and also that on the trial she testified that the value of the land was $5,000. In her answer she set up facts which she insisted showed that she had an equitable right to the land, and averred that she intended as soon as the patent was issued to the plaintiff to begin an action in the proper court to have the same declared a title in trust for her benefit, and asserted that by reason thereof an action of forcible entry and detainer could not be maintained against her. The Supreme Court of the Territory, in affirming the judgment, held that the matter in controversy was simply the right of possession. It closed its opinion in these words.

"This court in the case of *Kirtley* v. *Dykes*, (10 Okla. 18,) says: 'When the matter was finally decided by the land department, and a judgment rendered in favor of the plaintiff, her right to the possession of the premises was completed.' (*Armour Packing Co.* v. *Howe*, 64 Pac. Rep. 43; *Wideman* v. *Taylor*, 65 Pac. Rep. 615.) The entire theory of this action is that it is purely possessory; that it deals with the possessory rights, and not the ultimate rights of the parties. Questions other than the immediate rights of the parties cannot be litigated in such action. If the party desires to have an adjudication of her right to a resulting trust in the land, she must resort to another forum and another form of action."

Affidavits on the motion to dismiss show the value of possession to be not more than $640 per annum. Her own allegation in the answer is that the land and the relinquishment thereof were reasonably worth $5,000. Her testimony on the trial, and there was none other, was that the land was worth $5,000. Affidavits of witnesses assert that the ownership was in controversy and that the value of that ownership with the right of relinquishment was in excess of $5,000.

Upon these facts we think the motion to dismiss should be sustained. The matter in dispute being only the possession, clearly the value of that possession was but a few hundred dollars. Even if the title had been in controversy, the record up to the time of the decision of the Supreme Court showed that there was not exceeding $5,000 in controversy. The Supreme Court held that the matter in dispute was only the right of possession, and that right of possession was all that it decided. If the question of title was involved an action of forcible entry and detainer could not have been maintained, and the Probate Court had no jurisdiction of an action of ejectment. But before we can inquire whether the Supreme Court committed any error in its decision it must appear that we have jurisdiction of the case. Now whether the Supreme Court erred in permitting this forcible entry action to be maintained involves an inquiry whether it erred in permitting an action to be maintained in respect to something whose

value is less than $5,000. If that which alone could be in contest in the action and which alone was determined by the judgment is of a value less than $5,000, then it is beyond our jurisdiction to inquire whether the court erred in permitting the action to be maintained.

Further, neither of the four witnesses whose affidavits were filed to secure the writ of error testified directly to the value of the land, and while they said that the value of the relinquishment was from $6,000 to $8,500, yet clearly the value of a relinquishment cannot be greater than that of the land itself. But what is the relinquishment to which these witnesses refer? When one has made a homestead or pre-emption entry he may file in the land office a relinquishment of all rights obtained thereby, and if he does so the land becomes open to entry by another. If there has been no contest and the land records are free from any other claim than that which is relinquished, the second entryman may perfect a title. But if the records of the land office show that there has been a contest, and the successful contestant makes a relinquishment, a third party entering the land is charged with notice of the equitable rights of the unsuccessful contestant; and if, as a matter of law, those rights are entitled to protection, they can be enforced whenever the legal title has passed from the government. In other words, the relinquishment operates only against the party making the relinquishment and does not destroy any adverse rights of which there is in the land office an existing record. The plaintiff, although possession be obtained by him through this forcible entry and detainer action, cannot, by thereafter relinquishing his entry, and permitting some one else to make an entry, destroy the equitable rights, if any, which defendant possesses. Hence, as a relinquishment will not deprive the defendant of her equitable rights, and simply substitutes one party for another in any legal proceedings which she may hereafter institute to assert those rights, it is clear that it cannot have any such value as is ascribed to it in these affidavits.

The writ of error is *Dismissed.*

True copy.

Test:

Clerk Supreme Court, U. S.